Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-1411

REV. JOHN J. CAULFIELD, Pastor, St. Athanasius Church, REV. THOMAS A. KANE, J.C.D., Pastor, Nativity of Our Lord Church, VERY REV. JAMES G. SHERMAN, O.S.A., Pastor, St. Denis Church, REV. MSGR. FREDERICK J. STEVENSON, Pastor, St. John Chrysostom Church, and REV. GEORGE R. VERMEIREN, Pastor, St. Charles Borromeo Church,

Petitioners,

v.

PETER W. HIRSCH, Regional Director for the Fourth Region, National Labor Relations Board,

and

ASSOCIATION OF CATHOLIC TEACHERS, LOCAL 1776, AFT, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT BEFORE JUDGMENT.

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Petitioners

v.

PETER W. HIRSCH, Regional Director For The Fourth Region, National Labor Relations Board,

and

ASSOCIATION OF CATHOLIC TEACHERS, Local 1776, AFT, AFL-CIO,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT BEFORE JUDGMENT.

Petitioners respectfully pray that a writ of certiorari be issued to the United States Court of Appeals for the Third Circuit to review, before judgment, the decision and order made and entered by the United States District Court for the Eastern District of Pennsylvania in this matter on July 7, 1977.

OPINION BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is not yet officially reported; it is unofficially reported at 95 LRRM 3164 and is reprinted and appended hereto as Appendix A. The United States Court of Appeals for the Third Circuit has not rendered any opinion on the decision and judgment which are here sought to be reviewed.

JURISDICTION.

The judgment of the District Court granting final declaratory and permanent injunctive relief to Petitioners was entered on July 7, 1977 (Appendix A). Respondent, Peter W. Hirsch, timely docketed an appeal in the Court of Appeals on July 27, 1977, and Respondent, Association of Catholic Teachers, Local 1776, timely docketed an appeal in the Court of Appeals on August 5, 1977. The Court of Appeals has not acted on those appeals. Jurisdiction of this Court is invoked under Title 28 of the United States Code §§ 1254(1) and 2101(e), providing that a writ of certiorari may be granted upon petition of any party before rendition of judgment by a court of appeals.

QUESTIONS PRESENTED.

1. Whether application of the National Labor Relations Act to the schools of Petitioners, which are an integral part of the religious mission of a church, violates rights guaranteed to Petitioners by the Religion Clauses of the First Amendment.

2. Whether application of the National Labor Relations Act to the schools of Petitioners violates rights in the property and management of private non-tax-supported schools guaranteed to Petitioners by the Fifth and Ninth Amendments.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of . . . property, without due process of law. . . .

The Ninth Amendment to the United States Constitution provides:

> The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151 *et seq.*), are set forth in Appendix B hereto.

STATEMENT OF THE CASE.

In January, 1976, Respondent, Association of Catholic Teachers, Local 1776, filed a representation petition with Respondent Hirsch, as Regional Director of the National Labor Relations Board (the "Board"), seeking a representation election among the approximate 2,000 lay teachers employed by the 273 Catholic parish elementary schools located within the Archdiocese of Philadelphia. In response, Petitioners, as pastors of five of the parishes which operate elementary schools, instituted this action seeking declaratory and injunctive relief against the Board's assumption or exercise of jurisdiction over the parish elementary schools as violative, *inter alia*, of the Religion Clauses of the First Amendment.

On February 17, 1977, following trial, the District Court granted Petitioners preliminary injunctive relief. Respondents timely docketed appeals and, thereafter, on May 19, 1977, upon application of the Solicitor General, Mr. Justice Brennan, as Circuit Justice, granted the Board a partial stay of the preliminary injunction ". . . to the extent that the National Labor Relations Board is permitted to hold a representation election and to impound the ballots pending final disposition of the appeal[s] by the United States Court of Appeals for the Third Circuit" (Appendix C). An election was conducted by the Board among the parish elementary school lay teachers on June 14, 1977 and the ballots were and remain impounded.

On July 7, 1977, the District Court issued its final decision and order declaring the National Labor Relations Act (the "Act") ". . . unconstitutional as applied to the employment relationships between the lay teachers and the parish elementary schools within the Archdiocese of Philadelphia", and permanently enjoining the Board from ". . . asserting jurisdiction or taking any administrative

action . . . with respect to or in connection with the parish elementary schools of the Archdiocese of Philadelphia and the lay teachers employed therein." The District Court concluded that any attempt by the Board to exercise jurisdiction over these schools violates both the Free Exercise and Establishment Clauses of the First Amendment. Respondents timely docketed appeals in the Court of Appeals.

On September 8, 1977, a panel of three judges of the Court of Appeals heard oral argument on the appeals from the District Court's grant of the preliminary injunction but did not render any decision. On November 25, 1977, the Court of Appeals ordered that these appeals be reargued, together with the appeals from the District Court's final decision and order, before it *en banc*. Oral argument was scheduled for February 23, 1978. On February 21, 1978, this Court granted certiorari in *National Labor Relations Board v. The Catholic Bishop of Chicago and Diocese of Fort Wayne-South Bend, Inc., et al.*, No. 77-752. The following day, the Clerk of the Court of Appeals directed a letter to counsel for all parties to this case, stating:

> The Court has directed me to advise you that it has decided to continue the argument fixed for Thursday, February 23, 1978, before the Court en banc, because the United States Supreme Court has granted certiorari in NLRB v. Catholic Bishop of Chicago (No. 77-752). (Appendix D).

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals, by its indefinite continuance of argument and, therefore, decision of this case, has manifested its intent to dispose of Petitioners' contentions and rights on the basis of the decision to be rendered by this Court in the *Chicago-Fort Wayne* case. That case, however, concerns 2 minor seminaries and 5 diocesan high schools which, as a matter of fact and church law, are neither typical nor representative of the 273 parish elementary schools involved in this proceeding. Petitioners in this case present not only prime Free Exercise and Establishment Clause claims, but also Fifth and Ninth Amendment due process and privacy arguments not advanced in *Chicago-Fort Wayne,* on the basis of a record compiled before a United States district court rather than an administrative agency. It is respectfully submitted that before addressing the fundamental church-state issues raised by the Board's efforts to exercise jurisdiction over church-schools, the Court should grant this petition and take into account the additional factual and legal positions advanced by Petitioners. Only by doing so, can the Court insure adequate judicial consideration of Petitioners' constitutional claims, seek to determine the questions in the most significant factual contexts in which they have arisen, and avoid future and, perhaps, repeated requests for review of issues now ripe for the Court's resolution.

2. In view of the Court's grant of certiorari in *Chicago-Fort Wayne,* Petitioners believe that this case is of such national importance that normal appellate processes should be dispensed with and the issues promptly settled in this Court. The Solicitor General's petition in *Chicago-Fort Wayne* states: ". . . the question decided by the Court below is an important one; its decision would restrict the reach of the Act in a significant, sensitive area involving

some 10,000 schools and more than 100,000 lay teachers throughout the nation." More than 80% of these schools and lay teachers are parochial elementary schools and teachers.[1] It is therefore submitted that determination of the constitutional issues, as posed by *Chicago-Fort Wayne* in the context of secondary schools, should not be undertaken without consideration of the special position occupied by the parochial elementary school in the teaching ministry of the Catholic Church.

The record in this case is devoted to an examination of the distinctive characteristics of the parish elementary school and the impact and entanglements which would ensue from any application of the Act to such church-schools. This Court has previously observed that the inculcation of religious values and beliefs, which ". . . is the only reason for the schools' existence . . .", ". . . is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly." *Meek v. Pittenger,* 421 U. S. 349, 366 (1975); *Lemon v. Kurtzman,* 403 U. S. 602, 616 (1971). The grant of certiorari in this case would permit the Court to decide the constitutional questions presented in a comprehensive fashion with the full panoply of the Church's educational endeavors on both the primary and secondary levels before it.[2]

3. This case concerns the Board's serious misapprehension and misapplication of the Court's decisions in such Free Exercise and Establishment Clause cases as *Lemon v. Kurtzman,* 403 U. S. 602 (1971), *Sloan v. Lemon,* 413

1. The figures cited are from *The Official Catholic Directory,* general summary, pp. 1-2 (1977). There are some 8,375 Catholic elementary schools as compared to some 1,601 Catholic secondary schools throughout the country. Approximately two and one-half million students are enrolled in these elementary schools; some 900,000 students attend these high schools nationwide.

2. See, Comment, *The Free Exercise Clause, The NLRA, and Parochial School Teachers,* 126 U. Pa. L. Rev. 631 (1978).

U. S. 825 (1973) and *Meek v. Pittenger*, 421 U. S. 349 (1975).

Petitioners' schools are the very same Philadelphia schools which were before the Court in each of those cases and which were described by the Court as institutions ". . . in which religion is so pervasive that a substantial portion of [their] functions are subsumed in the religious mission . . .", ". . . religion-pervasive institutions . . . [whose] teaching process is to a large extent devoted to the inculcation of religious values and belief", institutions whose ". . . religious mission . . . is the only reason for the schools' existence", and institutions ". . . predominantly religious [in] character . . . ." 421 U. S. at 363, 366. The Board, however, says that Petitioners' schools ". . . while religiously associated, are not completely religious . . ." and are therefore subject to its regulatory powers under the Commerce Clause.[3] The conflict between the Court's view that parochial schools constitute ". . . an integral part of the religious mission of the Catholic Church . . .", 403 U. S. at 616, and the Board's view that such schools are merely ". . . religiously associated . . .", is most graphically illustrated by the present case. Since the Court and the Board have characterized Petitioners' very same schools in constitutionally dichotomous terms, the grant of certiorari in this case would appear particularly appropriate and would, it is believed, assist the Court in its understanding and resolution of the issues presented.

4. The grant of certiorari before judgment in this case is supported by prior decisions of the Court, *see, e.g.*,

3. Subsequent to Petitioners' commencement of this action in the District Court in January, 1976, but prior to that Court's issuance of the preliminary injunction in February, 1977, the Board conducted certain representation proceedings and in January, 1977 issued its decision and direction of election. The quotation is from that decision which is reported as *Archdiocese of Philadelphia*, 227 NLRB No. 177, 94 LRRM 1719, 1720 (1977).

United States v. Thomas, 361 U. S. 950 (1960), *Brown v. Board of Education*, 344 U. S. 1 (1952), granting certiorari where ". . . the nature of the issue posed in those appeals now before the Court . . ., and also the effect of any decision which it may render in those cases, are such that it would be well to consider, simultaneously, the constitutional issues posed in the case . . ." of which review is sought. 344 U. S. at 3. Moreover, grant of the petition will expeditiously dispose of this litigation ". . . consistent with proper judicial administration." *Turner v. City of Memphis*, 369 U. S. 350, 353 (1962), *Stainback v. Mo Hock Ke Lok Po*, 336 U. S. 368, 371 (1949). No other case pending in a court of appeals[4] challenges the constitutionality of the Act as applied to elementary schools—the schools which comprise more than 80% of all parochial schools in the nation.

4. The case of *Cardinal Timothy Manning v. National Labor Relations Board*, now pending in the Court of Appeals for the Ninth Circuit, No. 77-1286, like *Chicago-Fort Wayne*, concerns the constitutionality of the Act as applied to diocesan high schools.

CONCLUSION.

For the foregoing reasons, Petitioners respectfully urge that this Petition be granted.

Respectfully submitted,

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APPENDIX A.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-279

REV. JOHN J. CAULFIELD, et al.

v.

PETER W. HIRSCH, Regional Director for the Fourth Region, National Labor Relations Board

and

ASSOCIATION OF CATHOLIC TEACHERS, Local 1776, AFT, AFL-CIO

OPINION.

VANARTSDALEN, J. July 7, 1977

> "The constitutional standard is the separation of church and state. The problem . . . is one of degree."
>
> *Zorach v. Clauson;* 343 U. S. 306, 314 (1952).

I. Introduction.[1]

We are concerned with the constitutional propriety of the National Labor Relations Board (NLRB) asserting its

1. Plaintiffs have moved to make permanent the preliminary injunction entered on February 17, 1977. Pursuant to Fed. R. Civ. P. 65(a)(2), trial on the merits was consolidated with previous hearing on the application for preliminary injunction. To the extent I am required by Fed. R. Civ. P. 52(b) to make Findings of Fact and Conclusions of Law, the nature of this case and the convenience of the reader suggest these Findings and Conclusions be styled in narrative form.

regulatory authority over the employment relationships that exist between the Catholic elementary schools of the Archdiocese of Philadelphia and their lay teachers. The plaintiffs, five pastors of local parish schools, challenge and condemn *any* application to these schools of the regulatory powers conferred by the National Labor Relations Act (NLRA, Act)[2] as an unjustified interference by the Government with the religious liberties guaranteed the pastors and their Church by the first amendment.[3] Accordingly, plaintiffs now seek to make permanent the preliminary injunction previously issued by this court enjoining the NLRB from conducting a representation election among the lay teachers of the parish schools within the Philadelphia Archdiocese or further asserting its statutory jurisdiction.

II. Background and Procedural History.

A brief sketch of the relevant background and procedural history of this case may be helpful at this point.

On January 16, 1976, the intervenor-defendant Association of Catholic Teachers, Local 1776 (Union),[4] filed a representation petition with the local regional office of the NLRB pursuant to § 9(c) of the NLRA.[5] The petition asserted that a substantial number of lay elementary school teachers employed at the local parish schools within the

2. 29 U. S. C. § 151 *et seq.*

3. The first amendment reads, in pertinent part:

> Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof. . . .

U. S. Const. amend. I.

4. The Union is a labor organization acting on behalf of its members for the purpose of negotiating the terms and conditions of the employment of those members.

5. 29 U. S. C. § 159(c).

Archdiocese of Philadelphia wished to be represented for purposes of collective bargaining by the Union, and that the Union sought certification as the teachers' exclusive bargaining representative.[6] The petition denominated as the "employer" the Archdiocese of Philadelphia, and as the "employer representative to contact" John Cardinal Krol, Archbishop of Philadelphia.

On January 19, 1976, a copy of the petition, a form letter, and various other NLRB documents emanating from the local regional office of the NLRB were delivered by mail to the office of John Cardinal Krol.[7] The letter, addressed to the Archdiocese of Philadelphia, was signed by the defendant Peter W. Hirsch.[8] It demanded that certain enclosed forms and questionnaires be completed and returned, and that certain information be provided to the local regional office.

On January 27, 1976, the defendant Hirsch caused to be issued to the Archdiocese a "notice of representation hearing" informing the Archdiocese that a hearing before an NLRB hearing officer would be held commencing February 23, 1976, "upon the question of representation affecting commerce."[9]

On January 29, 1976, the present suit was instituted against the defendant Hirsch. The plaintiffs sought a declaratory judgment holding that the NLRA is unconstitutional as applied to them; they also sought preliminary

6. *See* Appendix I, *infra.*

7. *See* Appendix II, *infra.*

8. The defendant Hirsch is the Regional Director of the Fourth Region of the National Labor Relations Board, which region encompasses Philadelphia and the geographical boundaries of the Archdiocese of Philadelphia.

9. *See* Appendix III, *infra.* Such a hearing is held pursuant to § 9(c) of the NLRA. 29 U. S. C. § 159(c).

and permanent injunctive relief from the attempted assertion of jurisdiction over plaintiffs by the NLRB. The complaint additionally sought the convocation of a three judge district court pursuant to 28 U. S. C. §§ 2282, 2284.[10]

The Union filed a motion to intervene as a party defendant on February 3, 1976.

On February 9, 1976, acting as a single judge, I denied the plaintiffs' application for a temporary restraining order, granted the motion for convocation of a three judge district court,[11] and ordered that the Union's motion to intervene be held in abeyance.

On March 9, 1976, a hearing was held before the three judge court; oral argument was made, and testimony was taken before me, sitting as a single judge on behalf of the three judge court. Further hearings before me were held on March 12, 24 and 25.

On April 14, 1976, an opinion by Judge Fogel was filed on behalf of the three judge panel, dissolving the three judge district court on the basis that plaintiffs were not challenging the constitutionality of mandatory provisions of the NLRA, but rather the discretionary decisions of the NLRB acting pursuant to the NLRA.[12]

By order of April 22, 1976, this case was placed in suspense pending a decision by the NLRB as to its assertion of jurisdiction.

10. Since the time of the filing of the complaint, § 2282, which provided for a three judge district court whenever an Act of Congress was sought to be enjoined on constitutional grounds, has been repealed; similarly, § 2284 has been substantially amended. However, the repealer and amendments by their own terms have no retroactive application. Act of August 12, 1976, Pub. L. 94-381.

11. On February 11, 1976, by order of Chief Judge Seitz of the Third Circuit Court of Appeals, a three judge district court was convened.

12. *See National Maritime Union, AFL-CIO v. NLRB*, 375 F. Supp. 421 (E. D. Pa.), *aff'd*, 506 F. 2d 1052 (3d Cir. 1974).

On January 21, 1977, the NLRB rendered a "Decision and Direction of Election," [13] ordering that a representation election be held among full-time lay teachers employed by the approximately 275 parish elementary schools within the Archdiocese. The salient features of the opinion accompanying that decision are: (1) the Archdiocese, along with the individual pastors, are joint employers of the lay teachers; (2) a question of interstate commerce exists; and (3) an appropriate bargaining unit is all full-time lay teachers in the elementary schools within the Archdiocese.

On January 25, 1977, plaintiff filed with this court a motion to reconvene the three judge court and reinstated their motion for preliminary and permanent injunctive relief. A hearing was held on February 4, 1977, on all outstanding motions, and on February 17 I delivered an oral opinion from the bench addressing those motions. Initially resolved was the serious subject matter jurisdiction question. I held that despite the absence of a "final order" issued by the NLRB, special circumstances conferred jurisdiction upon the district court to entertain this suit. Further, I declined to reconvene the three judge district court, and I permitted the Union to intervene as a party defendant. Finally, and most significantly, a preliminary injunction was issued enjoining the defendant from taking any further administrative action, including the holding of an election, until the court had ruled on the plaintiffs' claims for permanent relief.

On March 3, 1977, the defendant Hirsch appealed to the Third Circuit Court of Appeals. The intervenor-defendant Union also appealed on that date and moved for a stay of the preliminary injunction. On March 9, 1977, the defendant Hirsch moved the Court of Appeals for an emer-

13. *Archdiocese of Philadelphia*, 227 NLRB 177, 94 LRRM 1719 (1977)

gency summary reversal. By order dated March 28, 1977, the Union's motion for a stay and defendant Hirsch's motion for summary reversal were denied by the Third Circuit. The appeals lodged in the Third Circuit, at this point, are following their normal course.

Finally, on May 11, 1977, the United States Solicitor General, on behalf of the NLRB, sought a stay of the preliminary injunction by lodging such a request with Mr. Justice Brennan, the Supreme Court Justice assigned to this circuit. On May 19, 1977 Justice Brennan issued an order which in effect modified the preliminary injunction entered on February 17, 1977. Pursuant to that order, the NLRB was permitted to conduct a representation election among the lay teachers, but the votes were to be impounded pending final disposition of the appeals in the Third Circuit. On May 31, 1977, the full Supreme Court declined to disturb Justice Brennan's stay order.

On Tuesday, June 14, 1977, a representation election among the lay elementary teachers was conducted under the auspices of the NLRB. The votes have not been counted and presently are impounded pending the resolution of this lawsuit in the federal courts.

III. Subject Matter Jurisdiction in the District Court.

As noted *supra*, the court has previously been called upon to resolve the serious subject matter jurisdictional issue.[14] Stated simplistically, that issue would appear to be whether the court is reviewing an order (the "Decision and Direction of Election") of the NLRB, which is admittedly not "final" and thus not reviewable in light of the

14. As in any case, the jurisdiction of this court to hear and determine the issues is of primary and fundamental concern. Federal courts are required to consider their jurisdiction even where the parties themselves raise no jurisdictional issue. In this case, however, jurisdiction has been squarely raised by the defendants.

Though I previously announced in the bench opinion of February 17, 1977, the basis for my determination that there exists subject matter jurisdiction, it would be appropriate to set forth that reasoning in this opinion.

settled caselaw interpreting § 10 of the NLRA,[15] or whether the court is being asked to entertain a lawsuit filed to protect a prime constitutional right. Plaintiffs seek to prevent *any* application whatsoever of the NLRA to parish schools because they contend that such application would constitute an invasion of plaintiffs' first amendment religious liberty rights.

The caselaw makes it extremely clear that representation determinations of the NLRB are *not* reviewable in the federal courts unless they are part and parcel of an *unfair labor practice* proceeding which results in a final order. *A. F. L. v. NLRB*, 308 U. S. 401 (1940). The NLRA is so structured because Congress intended to preclude direct review of representation proceedings before the NLRB. *A. F. L. v. NLRB, supra*, at 409. The rationale of non-review is premised upon a statutory goal that representation issues be expeditiously resolved, a goal which intermittent or interlocutory judicial intervention would thwart. There is little need to discuss the cases in support of this rationale.

In *Grutka v. Barbour*, 549 F. 2d 5 (7th Cir.), *cert. denied*, 45 U. S. L. W. 3717 (U. S. May 2, 1977), the Seventh Circuit held that the district court had no jurisdiction to enter a preliminary injunction in a suit brought by the Bishop of the Catholic Diocese of Gary, Indiana, against the NLRB to enjoin the NLRB from continuing with its representation proceedings concerning lay teachers in the Gary Diocesan schools. The plaintiff in *Grutka* had challenged any application of the NLRA to the Diocesan schools on first amendment religious freedom grounds, but the Seventh Circuit held that the administrative remedies extant before the NLRB must be exhausted as a prerequisite to federal jurisdiction.

15. 29 U. S. C. § 160.

Keeping all the above in mind, I nevertheless determined that this case was not a "labor" case but a "first amendment" case and the court was not being asked to review a representation order or decision of the NLRB. Further, I concluded that the *Grutka* case, though directly on point, was incorrectly decided.[16] It seems to me that plaintiffs who seek declaratory and injunctive relief from alleged violations of the religious liberty clauses guaranteed by the first amendment should have direct and immediate access to the federal courts. Plaintiffs here are asserting a prime constitutional right historically accorded special treatment by the federal courts. The question resolves itself to whether § 10 of the NLRA was intended by Congress to cover the instant situation where a party has sought injunctive relief from the very first instance of NLRB conduct affecting them in a constitutional sense, and where that party is not particularly interested in judicial review of representation proceedings as such.[17] The plaintiffs are not presently arguing that the NLRB has made an improper representation determination or has erred in some manner during the representation proceedings, but rather are challenging any application whatsoever of the NLRA.[18] The rationale underlying § 10—that intermittent or interlocutory appeals to the federal courts would hinder the representation process—simply does not apply. It is mere happenstance that the complaint was filed "during" the earliest stages of the representation process; in fact, it was filed within days after the Archdiocese had initially been contacted by the NLRB. The plaintiffs do not seek review of a representation order but are asserting a non-frivolous colorable constitutional claim. To deny access to the federal courts and force plaintiffs to adjudicate their first amendment contentions before an administrative agency whose expertise lies only in labor matters cannot be justified in the absence of a clear mandate from Congress.

Assuming that the rationale of § 10 does apply here, there are two known exceptions to that rule which permit jurisdiction in the district court. The first exception is that charted in *Leedom v. Kyne*, 358 U. S. 184 (1958). In *Kyne* the NLRB included both professional and non-professional employees in the same bargaining unit without taking a vote of the professional employees to determine whether they wished to be included in such a unit. Such a vote is expressly mandated by the NLRA.[19] The Supreme Court,

16. If I am to rule differently than any Circuit Court of Appeals, albeit a circuit court other than the one in which I am now sitting and thus not compelling or binding upon me, but certainly of very strong precedential value, it must be done with great caution and perhaps temerity. Nevertheless, it is my duty to interpret the law and the jurisdictional issues to the best of my understanding. In the absence of any binding decision from the Supreme Court or the Third Circuit Court of Appeals, it is up to this court to determine whether it has jurisdiction in the first instance. *See Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 457 (E. D. Pa. 1972).

17. Naturally, it is the burden of the plaintiff in federal court to establish the existence of subject matter jurisdiction. Article III of the Constitution extends the federal judicial power to cases arising under the Constitution, and 28 U. S. C. § 1331 confers upon the district courts subject matter jurisdiction over those cases. It seems to me that in a case such as this involving prime constitutional issues, that the burden, if there is a burden, should shift to the party asserting a lack of jurisdiction to show that Congress has made an exception and clearly limited the jurisdiction granted Article III courts.

18. It should be pointed out here that the plaintiffs are not presently contesting the determination of the NLRB that the pastors and the Archdiocese are joint employers or that full-time lay teachers is an appropriate bargaining unit. The only question before this court is the constitutionality of the Act as applied to the parish schools. Under the scheme of § 10 of the NLRA, the above determinations of the NLRB are properly contested only in a circuit court of appeals on appeal of a "final order."

19. 29 U. S. C. § 159(b).

in upholding jurisdiction in the district court, described the action as

> not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather, it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act.

358 U. S. at 188. Similarly, the instant case is "not one to review . . . a decision of the Board made within its jurisdiction." It is one to restrain the order or orders of the NLRB made contrary to the first amendment. *Kyne* may be read as standing for the proposition that where plaintiff is not seeking review of an NLRB representation order in the manner in which it would normally be reviewed by the Court of Appeals in a § 10 case, but rather is seeking relief from NLRB conduct which exceeds its statutory or constitutional power, then district court jurisdiction lies.

The second exception to the general rule of § 10 is that announced in *McCulloch v. Sociedad National*, 372 U. S. 10 (1962). In *McCulloch* the district court enjoined an NLRB order requiring an election for seamen on ships flying a Honduran flag of convenience, an order which had caused international protests. The Supreme Court, in ratifying the district court's jurisdiction, stated that the critical national interest involved was so compelling that the "important interests of the immediate parties" were subjugated entirely to a "uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power." 372 U. S. at 17. The language and rationale in *McCulloch* is at least arguably applicable to the instant case in light of the public interest it has generated and the unique constitutional questions it poses with respect to the NLRB's power.

Finally, some analysis should be made of the only reported decision on point, the *Grutka* case, *supra*. In *Grutka*, the Seventh Circuit placed heavy reliance upon the lack of a developed factual record below and noted that the exhaustion of administrative remedies doctrine—a rationale underlying § 10 of the NLRA—is premised upon a need for such a record, the fact-finding expertise of the administrative body involved, and the desire to prevent judicial interruption of on-going administrative process. In my view, none of these considerations applies in the instant case, because (1) there is a developed factual record on the religious nature of the schools and the effect of NLRB regulation on those schools, (2) the NLRB is not an expert body with respect to prime first amendment religious liberty issues but rather a federal district court is, and (3) the plaintiffs never sought to *interrupt* the "on-going administrative process" but rather attacked the application of that process at the earliest possible opportunity. It should be emphasized that this is *not* a situation where NLRB expertise in labor matters is desirable or necessary; it would appear that the NLRB is less equipped than a district court to rule on the serious constitutional issues.[20] The Supreme Court has suggested that the "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies" in situations where the factual basis is not in serious dispute. *Oestereich v. Selective Service Board No. 11*, 393 U. S. 233, 242 (Harlan J., concurring). *Cf. Mathews v. Diaz*, 44 U. S. L. W. 4748 (U. S., June 1, 1976).

20. In this regard, *see Comprehensive Group Health Serv. Bd. of Directors v. Temple University*, 363 F. Supp. 1069 (E. D. Pa. 1973), where the district court held that a court should not insist on exhaustion of administrative remedies when the particular issue involved is a constitutional or legal one and is *not* one addressed to the particular area of administrative expertise.

In addition, the Seventh Circuit in *Grutka* viewed the problem as one of application of the doctrine of exhaustion of administrative remedies, as noted above. The Third Circuit has perhaps taken a different stance with respect to this doctrine. In *United States ex rel. Marrero v. Warden*, 483 F. 2d 656 (3d Cir. 1973), the Third Circuit stated that the

> basic premises underlying the exhaustion requirement are that (1) judicial review may be facilitated by allowing the appropriate agency to develop a factual record and apply its expertise (2) judicial time may be conserved because the agency might grant the relief sought and (3) administrative autonomy requires that an agency be given an opportunity to correct its own errors.

483 F. 2d at 659. The court went on to say that since none of these three basic goals of administrative process would be served in the case, the plaintiff should not be required to exhaust his remedies. As discussed above, the same conclusions can be drawn in the instant case. The *Marrero* court also embraced the notion that even if exhaustion was required under the three factors enumerated above, if pursuing an administrative remedy would be *futile*, the requirement may be waived. Arguably, the NLRB will not change its position on assertion of jurisdiction and the constitutional issues; thus, with respect to pursuing administrative redress, the plaintiffs are doomed from the outset. The NLRB has already brushed aside the constitutional claims of the plaintiffs, not only here but also in other NLRB proceedings involving other parochial schools. *See, e.g., Grutka v. Barbour, supra.*

Thus, I am convinced the district court has jurisdiction over the subject matter and, therefore, should proceed to the merits of this case.

IV. The First Amendment.

A. The Constitutional Standards.

There exists an abundance of literature, including Supreme Court opinions, discussing the historical context and development of the Religion Clauses of the first amendment.[21] It need not be repeated here. We need only be mindful that sovereign establishment of a central church, and to a lesser extent religious persecution, were not insignificant factors in triggering the revolutionary events of 200 years ago. Accordingly, the Founding Fathers saw fit to articulate a constitutional provision whose purpose was to achieve complete religious neutrality on the part of the government. This was effectuated in the following manner:

> Congress shall make no law respecting the establishment of religion, nor prohibiting the free exercise thereof. . . .

These simple words contained in the first amendment are central to the American way of life. I find it not inconsequential that the Religion Clauses not only reside in the *first* amendment, but in fact they form the initial utterances of our Bill of Rights. Speaking in another context, Chief Justice Warren once stated:

> For almost two centuries our country has taken singular pride in the democratic ideas enshrined in its Constitution, and the most cherished of those ideas have found expression in the First Amendment.[22]

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21. *See, e.g., Engel v. Vitale*, 370 U. S. 421 (1962); *Everson v. Board of Educ.*, 330 U. S. 1 (1947).

22. *United States v. Robel*, 389 U. S. 258, 263-64 (1967).

Thus, there need be no prolonged discussion as to the constitutional sensitivity of the matters involved in this case. It is with this sensitivity in mind that the present controversy must and will be approached. *Lemon v. Kurtzman*, 403 U. S. 602, 612 (1971).

The Religion Clauses, as with other important constitutional provisions, are expressed in the most general of terms. These terms, though general, are absolute, as their "purpose was to state an objective, not to write a statute." [23] The legal and practical meaning of the Religion Clauses has been developed and redeveloped in the opinions of the United States Supreme Court. These statements of the Court, expressly and impliedly, suggest but one generalization: there can be no generalizations in the religious liberty area. The Supreme Court cases, when read together, do not produce an uninterrupted thread of doctrinal development. Rather, the Court from time to time has reconsidered and rejected prior accepted religious liberty doctrine and precedent.[24] The first amendment commands only that no religion be favored and that no religion be inhibited. Beyond that simple dictate, the federal courts have struggled to give meaning to the Clauses on a case-by-case basis. The well-worn and much-maligned adage of "ad hoc approach" makes its home in this area of constitutional law. However, statements by the Supreme Court on religious liberty must be followed as literally as possible. These statements provide broad guidance in their delimitations as to the *meaning* of the first amendment,[25] although as to the specific application of

23. *Walz v. Tax Commissioner*, 397 U. S. 664, 668 (1970).

24. *Compare Cantwell v. Connecticut*, 310 U. S. 296 (1940) with *Reynolds v. United States*, 98 U. S. 145 (1878) (where the longstanding distinction between religious *belief* and religious *action* was abandoned.).

25. *See, e.g., Lemon v. Kurtzman*, 403 U. S. 602, 625-42 (1971) (concurring opinion of Douglas, J.); *McGowan v. Maryland*, 366 U. S. 420, 459-543 (1961) (separate opinion of Frankfurter, J.).

those Clauses they offer little aid in resolving the present case.

Much of the difficulty arises from the fact that the first amendment seeks religious neutrality from the implementation of two distinct clauses which purportedly have converse meaning and converse application. The "Establishment" Clause was intended to prohibit not only the so-called "state Church" from which many of the colonists sought to escape, but also less egregious forms of aid, sponsorship, assistance and involvement by the government. On the other hand, the purpose of the "Free Exercise" Clause was to preserve and protect the uninhibited exercise of religious belief and conduct so as to permit any religion to "flourish according to the zeal of its adherents and the appeal of its dogma." [26] Unfortunately, the courts have seized upon the separateness of the Religion Clauses and tend to speak in terms of "free exercise" cases as opposed to "establishment" cases. The first amendment requires nothing more than that a neutral religious stance be assumed by the government; nowhere does it demand that the considerations underlying both Clauses be kept separate and distinct or that these considerations cannot both be applicable to the same controversy. As will be seen, *infra*, the apparently disparate rationales and objectives underlying the Religion Clauses may become intertwined in the same set of circumstances.

The question presented is whether the NLRA, an act whose express purpose was the alleviation of industrial strife through the guarantee of employee organizational and representational freedom, is unconstitutional as applied to the local parish elementary schools of the Archdiocese of Philadelphia. Plaintiffs, five pastors of these elementary schools, through the course of this litigation have primarily asserted that such an application interferes with

26. *Zorach v. Clauson*, 343 U.S. 306, 313 (1962).

their religious liberty and the religious liberty of their Church. A contention of this nature, by category, suggests a "free exercise" claim in that the pastors claim an indirect burden will be placed upon the exercise of the religious mission of these Catholic schools by the intervention of the NLRB as an "arbiter" of internal Church affairs. On the other hand, the plaintiffs also claim that the continuing assertion of jurisdiction by the NLRB, the "inevitable" NLRB bargaining order directing the Archdiocese and the pastors to bargain with the lay teachers over religious matters, as well as other potential and inevitable conduct on the part of the NLRB, will "excessively entangle" the Government in the administration of Church affairs. "Excessive entanglement" is the current catch-phrase for the recent crop of "establishment" cases in the Supreme Court involving state or federal financial assistance to religiously-affiliated schools. Thus, both strains of the Religion Clauses must be examined.

The most recent statement of the Supreme Court in the free exercise area is *Wisconsin v. Yoder*, 406 U. S. 205 (1972). There, the defendants were parents and members of the Amish religion who had been convicted in the state court for violating a state statute requiring the compulsory attendance of children under age sixteen at a public or approved private school. Though complying with this law for attendance of their children up through the eighth grade, the defendant-parents resisted education of their children in public or private secondary schools because to do so would force exposure to certain worldly values believed to controvert Amish religious tenets. The defendants claimed the religious liberty guarantee of the first amendment necessitated an exemption for them from the state compulsory education statute. The state argued that even admitting the profound religious nature of the Amish lifestyle and the admitted burden that the compulsory

education statute placed upon that religious activity, nevertheless the state had an overriding interest in enforcement of the statute. The Supreme Court rejected the state's contention and reversed the convictions of the Amish parents. In doing so, the Court utilized the balancing approach first set out in *Sherbert v. Verner*, 374 U. S. 398 (1963).[27] First, the Court concluded after lengthy discussion that the Amish lifestyle was one of "deep religious conviction . . . intimately related to daily living." This finding was necessary in order for the Court to move to the second step of the *Sherbert* analysis, *i.e.*, whether some cognizable religious activity had been *burdened* by the state. The Court concluded in almost summary fashion that the compulsory education statute "would gravely danger if not destroy the free exercise of [the parents] religious beliefs." This conclusion compelled the Court to engage itself in the final analytical step; whether, given the existence of a significant free exercise violation, the statute sought to protect a state interest sufficiently compelling to outweigh the parents' religious interests and thus require enforcement of the statute. The Court discussed at length and rejected the three arguments offered by the state to show such a compelling interest, and reversed the parents' conviction.

In addition to the careful attention which must be paid to the *Yoder* Court's general method of analysis, two important features of that analysis require special mention. First, the Court approved the balancing test utilized in *Sherbert, supra,* where the Court had been faced with an indirect, as opposed to a direct, burden on religious ac-

27. In *Sherbert*, plaintiff, a Seventh Day Adventist, sued to recover unemployment benefits denied her by the state because she would not accept Saturday work in violation of her religious beliefs. The Court weighed the interest of the state in protecting its regulatory scheme from fraudulent claims against plaintiff's religious interests and struck the balance in plaintiff's favor.

tivity. That is to say, *Sherbert* dealt with a situation wherein no religious activity was expressly prohibited or made impossible, but was merely made more difficult. This recognition by the Court of first amendment protection of even indirect burdens on religious activity is important to the present case. Second, the Court in *Yoder*, as it had done in *Sherbert*, engaged in a sliding-scale analysis of balancing the interests. However, it is evident that the scales were initially tipped heavily in favor of the religious interest. The greater the burden on religious activity, the more compelling the government's interest must be to sustain the legislation in question. Certainly, the Court indicated that a mere "rational relation" standard, a norm oft-used in other constitutional contexts, would be grossly inadequate in dealing with questions of religious liberty.

Thus, at least as to free exercise claims, the Supreme Court has fashioned a loose analytical framework to guide the lower courts. That model will be followed here, insofar as possible.

As pointed out, *supra*, plaintiffs' briefs and arguments have also included what may be considered "establishment" contentions. This is somewhat unusual as most if not all of the reported establishment cases have dealt with legislation specifically designed to *assist* Churches, church schools or parochial school students, or to advance their religious cause. Certainly, no one would argue that the NLRA has such a purpose or effect. Instead, plaintiffs' establishment claims have centered upon the third element of the tripartite analysis set out by the Supreme Court in *Wolman v. Walter*, 45 U. S. L. W. 4861, 4862 (U. S. June 21, 1977): "a statute must not foster an excessive government entanglement with religion." [28] Plaintiffs' basic argu-

28. In addition to avoiding an "excessive entanglement," in order to survive a first amendment establishment attack, the legislation in question (1) must have a secular legislative *purpose* and

ment is that application of the NLRA to the lay teachers and the parish elementary schools would inevitably result in an entanglement of the NLRB and the schools to a degree not permitted by the first amendment. Plaintiffs envision this entanglement in several various ways, not to be discussed here in detail. Their entanglement fears are grounded primarily upon the fact that the Government will become a referee or "arbiter" of the employment relationships in the parish schools; since, the argument continues, the schools are so pervasively religious in nature, it will be impossible for the Government to avoid some direct or indirect regulation of the religious mission of the Church schools. Certainly, if this is so, the Supreme Court's views as to what constitutes excessive entanglement would necessarily be transgressed.[29]

Having laid out a very fundamental framework of the first amendment issues raised, it would be appropriate to set forth the factual undergirdings of this case, as they are obviously critical to the constitutional standards to be applied.

B. The Religious Nature of the Parish Elementary Schools.

Plaintiffs, who are Roman Catholic pastors, their respective parishes, and their parish elementary schools, are typical of the approximately 275 parish elementary schools

28. (Cont'd.)
(2) must not have a primary *effect* which either advances or inhibits religion. *Wolman, supra* at 4862. The test is disjunctive in that failure to meet any one of the three general elements necessarily condemns the legislation. *Meek v. Pittenger*, 421 U. S. 349, 358 (1975).

29. *See Lemon v. Kurtzman*, 403 U. S. 602 (1971); *Walz v. Tax Commission*, 397 U. S. 664 (1970); *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (D. N. J. 1973), *aff'd*, 417 U. S. 961 (1974).

that exist within the geographical limits of the Archdiocese of Philadelphia. There can be little question as to the religious nature of these schools. Though, as defendants correctly observe, the parish schools engage themselves in providing a secular education to their students, these schools are religious enterprises forming an integral part of the religious mission of the Catholic Church. The Supreme Court, in describing these same Philadelphia Catholic schools, recognized

> the fact that the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools existence. Within the institution, the two are inextricably intertwined.

Lemon v. Kurtzman, supra, at 657 (opinion of Brennan, J.). The parish schools would not exist simply to provide a secular education; they have as their purpose the realization of the religious mission of the Catholic Church. The parish schools are maintained, operated and conducted in a religious atmosphere which pervades the schools. They are located on property proximate to the parish Church, in order to facilitate access to the Church for certain religious exercises. Religious symbols such as crucifixes, paintings, and statues are found in the parish school buildings. Adjustments in daily class schedules are made to accommodate liturgical observances and recognition of religious holidays. The parish school faculties include religious members (nuns and priests) whose religious vocation is promoted and encouraged by the parish schools. A majority of the lay teachers in the parish schools are practicing Catholics and their religious character, along with that of the non-Catholic teachers, is a critical factor assessed in choosing a lay teacher for employment in the parish schools. If a lay teacher is deemed by the pastor

not to have achieved or maintained a certain standard of Catholic faith or a proper standard of morality consistent with Catholic religious tenets, the pastor may have to determine whether discipline or dismissal of that teacher is appropriate in keeping with the religious mission of the schools. Catholic faith is engrained in and transmitted to the students in the parish schools not only by instruction but also by the very presence of teachers who exhibit and display firm religious beliefs, consistent with the Catholic faith. Curriculum, and the religious and moral conduct of faculty members, are crucial to the inculcation of religious values in the students and the realization by the parish schools of the religious mission of the Church. Religious truths and values pervade each subject instructed in the parish schools.

These are merely some of the factors brought to light by the testimony of the various plaintiffs and other religious persons that lead me to conclude without the slightest hesitancy that the parish elementary schools are profoundly religious in character.[30]

C. The National Labor Relations Act.

It is not necessary to recite the history of the labor movement in this country, nor to describe the historical, social and political environment in which the NLRA arose.[31] It is enough to say that the purpose of the NLRA

30. Three times the Supreme Court has considered attempts by the Pennsylvania legislative to fund or assist the very Philadelphia Catholic schools involved here. *See Meek v. Pittenger, supra; Sloan v. Lemon,* 413 U. S. 825 (1974); *Lemon v. Kurtzman, supra.* In both *Lemon* and *Meek* the Supreme Court made specific references to the profound religious nature of these schools. These passages employed strong descriptive language, rising nearly to the level of findings of fact, and many of the characteristics noted by the Court are applicable here.

31. For an enlightening account of the legislative and judicial reaction to the modern labor movement, *see* ABA, THE DEVELOPING LABOR LAW, ch. I-VI (1971).

was to free the flow of interstate commerce then burdened by industrial strife due to employee-employer discord over employee representational, organizational and collective bargaining rights.[32] This was primarily effectuated through § 7 of the Act which gave employees certain enforceable rights with respect to organizing, forming, or joining a labor organization to bargain collectively on their behalf.[33] The remainder of the Act is primarily preoccupied with definitions, the creation and administration of the NLRB, the delineation of certain conduct which is prohibited as unfair labor practices, procedure with respect to representation elections, judicial review of NLRB determinations, investigatory powers of the NLRB, and so on. The act was designed to avoid "industrial strife" by compelling the employer to meet and bargain in good faith with a collective bargaining representative freely chosen by the majority of employees within an appropriate bargaining unit. There can be no question as to the general constitutionality of the NLRA, a question decided early on by the Supreme Court.[34]

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32. The statement of policy contained in § 1 of the NLRA makes this clear:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U. S. C. § 151.

33. 29 U. S. C. § 157.

34. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937). The Court held that the Commerce Clause empowered Congress to regulate the employment relationships of employers whose activities affected interstate commerce.

The Act confers upon the NLRB two basic functions. First, as a quasi-judicial body, it is charged with the task of determining whether particular conduct constitutes an *unfair labor practice* as defined in § 8 of the NLRA. This is accomplished in adversary proceedings and results in NLRB orders which are "final" and reviewable and enforceable by a United States Court of Appeals under § 10(e) and (f). The process is initiated by the filing of an unfair labor practice charge with a regional office of the NLRB alleging a violation of the Act on the part of an employer or a labor union. The charge is investigated by an NLRB agent and generally the regional director determines whether a formal complaint is sufficiently meritorious to be prosecuted. Where a formal complaint is issued, a hearing is held before an NLRB trial examiner who receives testimony and evidence and ultimately renders a decision containing findings of fact and conclusions of law. If an exception is taken to this decision, the five-member Board in Washington, D. C., then reviews the decision (and the record created below) and issues a decision and order of its own. These orders are reviewable in the appropriate federal court of appeals.

The NLRB's other prime function is one of monitor-referee with respect to so-called "representation" issues and proceedings. "Representation" refers to the statutory process whereby a group of employees selects a representative (a union) to bargain in their collective behalf.[35]

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35. This process is normally initiated by the filing of a representation petition with the regional office of the NLRB. Under the internal rules and regulations of the NLRB the petition must be supported by a showing that a substantial number of employees —30%—wish to have an election, in order for the NLRB to commence its representation investigation. *See* 29 U. S. C. § 159(c); NLRB, RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE, SERIES 8, AS AMENDED.

The NLRB's responsibility in this area involves the investigation of questions of representation,[36] and conducting and certifying the results of elections among appropriate units of employees in order that the employees may freely designate, if they wish, representatives for the purpose of collective bargaining. These proceedings are non-adversary in nature, and although actions are taken and decisions made by the NLRB affecting the employer and employees, they do not result in the issuance of a "final" order subject to immediate judicial review.

As suggested above by the oversimplified description of the functions of the NLRB, Congress has invested that body with a certain amount of investigatory powers. These powers arise in both representation and unfair labor practice contexts. The NLRA, in express terms, both authorizes investigations of employers and provides the machinery necessary to conduct those investigations. Section 3(b) authorizes the Board to delegate to the regional directors its powers under § 9 to "investigate and hold hearings." Section 9(c)(1) directs that the Board "shall investigate" a representation petition to determine if there is reasonable cause to believe a question of representation exists. Section 10(c) provides that where a person (including an employer) shall have been found to engage in an unfair labor practice, the Board as part of its remedial relief may "require such person to make reports from time to time showing the extent to which it has complied" with a cease and desist or other Board order. These are the express statutory references to the NLRB's investigatory

36. Generally speaking, these questions include whether the NLRB has jurisdiction in the sense that the employer engages in activities affecting interstate commerce, determining an appropriate bargaining unit, and whether policy or statutory reasons would preclude assertion of jurisdiction or the conducting of an election by the NLRB. *See* ABA, THE DEVELOPING LABOR LAW, 825-28 (1971).

and monitoring authority. This authority arises from § 11 which provides the mechanics for NLRB investigations. Because § 11 is particularly important, its pertinent portions will be set out in full:

> *Investigatory Powers*
>
> Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—
>
> (1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses,

and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents or other evidence in obedience to the subpena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

In addition, § 6 of the NLRA authorizes the NLRB to promulgate rules and regulations "as may be necessary to carry out the provisions of the Act," including those provisions regarding investigation. These rules and regulations are found in NLRB, RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE, SERIES 8, AS AMENDED.[37] Section 102.31 provides for a general subpoena power in the NLRB and, by delegation, to regional directors and trial examiners, in the context of § 10 hearings on unfair labor practices. The subpoena may be used to compel not only testimony but also the production of documents, records, correspondence, or other material. The subpoena is enforceable in a federal district court. Section 102.63 directs the regional director to serve a notice of hearing on an employer if, after a § 9 representation petition has been filed, the regional director has reasonable cause to believe that a question affecting commerce exists. At the representation hearing, § 102.66 provides for a subpoena power in the regional director, similar to that in § 102.31. Section 102.69 incorporates the procedures, including the subpoena power, set forth in § 102.66, where a hearing is necessitated by a challenge or challenges to ballots received in a representation election. Section 102.77 requires the regional director to make an investigation whenever a petition is filed pursuant to § 102.76,[38] again incorporating the procedures and powers of § 102.66.

37. Sections 101.1 *et seq.* of this work contain the "Statements of Procedure" issued by the NLRB pursuant to § 6 of the NLRA and 5 U. S. C. § 552(a)(1)(B). Sections 102.1 *et seq.* set forth the formal "Rules and Regulations" also promulgated pursuant to § 6 of the NLRA. The Rules and Regulations and Statements of Procedure apparently are not found in the Code of Federal Regulations but amendments thereto do appear in the Federal Register. For convenience, these rules and statements will be identified by their specific number in the 101 or 102 series.

38. Section 102.76 provides for the filing of a representation petition when picketing of an employer "has been conducted for an object proscribed by section 8(b)(7) of the act."

The NLRB has also caused to be formulated certain Statements of Procedure, as described in the margin, *supra*. These statements articulate the "general course and method by which the Board's functions are channeled and determined." Section 101.4 states that where an unfair labor practice has been charged, the person against whom the charge has been filed is asked to submit a statement of position with respect to the charges. It also describes that the investigation of an unfair labor practice may call for interviews of the parties. Section 101.13 contemplates the monitoring of compliance with a Board decision and order issued as a result of unfair labor practice proceeding. Section 101.18 describes the mechanics for an investigation by an NLRB field examiner where a § 9(c) representation petition is filed. The purpose of this investigation is to attempt to gather evidence concerning the extent of interstate commerce affected by the employer's activities, whether the proposed bargaining unit is appropriate, and whether a substantial (30%) number of employees wish to be represented by a particular labor union. As described in § 101.20 a formal hearing on these questions may be held if necessary to resolve them. Sections 101.22, 101.23, 101.27 and 101.32 all describe certain types of representation and unfair labor practice investigations and they either incorporate or closely track the description set forth in § 101.4.

Thus it is evident that the NLRA bestows upon the NLRB a broad authority to conduct investigations in a wide variety of circumstances covered by the Act. It is further evident that many of these investigations, particularly those involving representation matters, would focus upon the internal affairs of the employer. The NLRB would appear to have a judicially enforceable power to extract information relevant to an investigation from such employers.

Finally, in discussing the general nature of the NLRA, some mention should be made of § 8(a)(5). Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the employees' representative. Section 8(d) defines "bargain collectively" as

> the mutual obligation of the employer and the representative to meet . . . and confer in good faith with respect to wages, hours, *and other terms and conditions of employment*. . . .

29 U. S. C. §§ 158(a)(5), (d) (emphasis added). This duty to "bargain in good faith" over "terms and conditions of employment" has been construed to mean that although the NLRB may referee the process of bargaining and may require parties to negotiate, it may "not compel either party to agree to a proposal or require the making of a concession." [39]

The phrase "terms and conditions of employment" is obviously very general in nature, and numerous topics, activities, and areas fall within the meaning of the phrase. It can be said, however, without resort to cited authority, that *workload* and employee discipline are topics which relate to terms and conditions of employment and, thus, are subject to mandatory collective bargaining. This fact, as will be seen, is important to the legal analysis.

D. Constitutionality of the Application of the NLRA to the Parish Elementary Schools.

1. *Free Exercise Claims.*

Wisconsin v. Yoder, supra, utilized a simple and basic approach to a situation where religious conduct is alleged to be unjustifiably burdened by the government. The

39. *H. K. Porter Co. v. NLRB,* 397 U. S. 99, 106 *quoting* 29 U. S. C. § 158(d).

Yoder Court felt it necessary to ascertain that the claims presented were religious, and not secular, in order to invoke the protection of the Religion Clauses; that the religious conduct was burdened or constrained in some cognizable fashion by reason of application of the legislation in question; and finally, having found these two elements to exist, to inquire whether the interest sought to be protected by the legislation is sufficiently compelling to override the interest in permitting an unburdened exercise of religion. The test is simple and appealing in its design; however, as in most religious liberty cases, it is tailored to the immediacies of its own specific circumstances. As Mr. Justice Stewart warned in *Meek v. Pittenger, supra,* at 359,

> the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify the instances in which the objectives of the [first amendment] have been impaired.

Another strong statement in support of an analysis guided by the objectives and goals of the framers of the first amendment was set forth by Mr. Justice Frankfurter in *Dennis v. United States,* 341 U. S. 494, 523 (opinion of Frankfurter, J.):

> The language of the First Amendment is to be read not as barren words found in a dictionary but as symbolic of historic experience illumined by the presuppositions of those who employed them. Not what words did Madison and Hamilton use, but what was it in their minds which they conveyed.

Thus, the court is to be guided more by the then existing fears and concerns of the framers of the Religion

Clauses, than by whether the instant circumstances can neatly fit within one or another of the "tests" announced by the Supreme Court in other cases.

There can be no question as to the religious nature of the parish schools. It is also beyond peradventure that the admitted secular characteristics of the schools are so intertwined with the schools' religious mission, that they blend imperceptibly one into the other.

However, there does appear to be some question as to whether the religious activity of the pastors or their Church schools has been or will be impinged in any fashion by the NLRA. The Act was certainly not intended to regulate religious activity as such; its purpose was to secure industrial peace through compulsory bargaining. On its face, the NLRA neither advances nor inhibits religion. Nevertheless, the special circumstances surrounding the religious mission of these parish schools, the relationships of lay teachers with their pastors, religious teachers, and fellow lay teachers, the inseparable intertwining of factors such as curriculum and teacher discipline with the religious mission of the schools, and the pervasive authority of the NLRB over the employment area, persuade me that an interference with religious activity has occurred, and that further interference is inevitable.

The NLRA, as applied in the case *sub judice,* empowers the NLRB to segregate a particular category of employees as a "unit appropriate for bargaining." Here, the NLRB has devised and sanctioned the division of lay teachers from religious teachers, affording to the former group the potential benefits of NLRB protection and regulation while excluding those to the latter. This division, though characterized as neutral or secular in purpose and effect by the defendants, burdens the free exercise of the Church schools' belief in a single undivided community of faith as contemplated by the schools' religious mission.

Plaintiffs' testimony establishes this belief and certainly suggests that a divisiveness or competitive interface between and among the lay and religious faculty members would work a harm to the religious goals and objectives of the pastors and their Church. Further, this division is even more deleterious in its potential effect. The effectiveness of a certified collective bargaining representative in acquiring and protecting employee rights and benefits cannot be doubted. To assume that a union will seek, where possible, closed shop, union shop, or other union security provisions is not to engage in fantasy. The adverse effects upon the religious faculty members which flow from the failure to be made a part of the bargaining unit may very well include their partial, substantial, or total ouster. This would do grave injury to the pastors' belief that a proper mixture of religious and lay teachers is necessary to the mission of the parish schools. This mission is the inculcation of religious values in the school children, and it has been testified to by the plaintiffs that a *unified* faculty devoted to the impressment of these values in the children is essential.

As discussed *supra*, the NLRB is empowered to compel collective bargaining by an employer and employees representative over "wages, hours, and other terms and conditions of employment." The failure to so bargain can result in the NLRB issuance of an 8(a)(5) violation and bargaining order. To governmentally compel the pastors or the Archdiocese to bargain with a union over ecclesiastical concerns would certainly, in my mind, constitute a constraint upon the free exercise of religion. To be sure, the NLRB could never require the pastors to *agree* to a certain proposal or accede to a certain demand which touches upon religious matters. However, under the Act they could be compelled to at least *bargain* "in good faith" as to those matters. The crux of the problem is that the "terms and

conditions" of employment at some point become inseparable from the religious mission of the Church schools. The schools and their teachings are so pervasively religious that nearly all activities which are appropriate for mandatory collective bargaining embrace or at least relate to religious matters. Thus, even assuming the NLRB would afford some protection to religious doctrine, it would be faced with the insuperable task of separating that which is secular from that which is religious in order to determine what is appropriate for bargaining. Particularly sensitive to the pastors' concern are matters of curriculum and teacher discipline. It is their belief that they must have exclusive authority in these areas in order to maintain the integrity of the mission of the schools; in other words such decisions cannot be made the focus of bargaining. That the union would either directly or indirectly properly be concerned with curriculum and teacher discipline is at present only a probability. One commentator has assessed such probability this way:

> Once a bargaining agent has the weight of statutory certification behind it, a familiar process comes into play. First, the matter of salaries is linked to the matter of workload; workload is then related directly to class size, class size to range of offerings, and range of offerings to curricular policy. Dispute over class size may also lead to bargaining over admissions policies. This transmutation of academic policy into employment terms is not inevitable, but it is quite likely to occur.

BROWN, COLLECTIVE BARGAINING IN HIGHER EDUCATION, 67 Mich. L. Rev. 1067, 1075 (1969). As can be seen, the religious mission of the Church schools will almost in-

evitably fall within the scope of mandatory bargaining. This is so because the NLRA, and NLRB interpretation thereunder, dictates as much. This is an impermissible restraint on plaintiffs' first amendment right to freely exercise their religious beliefs.

Should the pastors or Archdiocese refuse to bargain over curriculum, teacher discipline, or other topics they regard as central to the religious mission of the Church, or should a pastor discipline or dismiss a lay teacher for conduct considered morally or spiritually incompatible with the tenets of the Catholic faith but suspected by the teacher to be disciplinary reprisal for union activity, the NLRB would be empowered to proceed against the pastors or the Archdiocese in order to prevent an "unfair labor practice." [40] In the former situation, the unconstitutionality of the NLRB compelling the Church schools to bargain over what they firmly believe to be religious concerns and doctrine has been discussed. In the latter situation, the NLRB would be authorized by the Act to inquire and determine whether the disciplinary action taken by the pastor was for reasons related to the religious mission of the Church schools or to discourage union activity. As a consequence, the NLRB would be required to interpret a matter of ecclesiastical concern, a matter not only far beyond its expertise but also transgressing the limits of its constitutional authority.

The defendants have raised the argument that many of the pastors' fears with respect to NLRB regulation of the Church schools have not yet materialized, and in fact many never do so. They assert that the mere *potential* for interference with plaintiffs' right to freely exercise their religious belief is insufficient to invoke the protection of

40. *See* §§ 8(a) and 10 of the NLRA, 29 U. S. C. §§ 158(a), 160.

the Religion Clauses. I disagree. The Supreme Court has addressed that argument insofar as it was presented in *Lemon v. Kurtzman, supra,* an "establishment" case involving state aid to parochial schools. There the Court examined aid-to-parochial-school statutes based upon *allegations* of excessive entanglement and without benefit of a record establishing such entanglement.[41] The Court dealt unmistakably with legislation "*apt* to entangle," with the "*potential* for impermissible fostering of religion," and creating a "relationship *pregnant* with *dangers* of excessive entanglement." *Lemon v. Kurtzman, supra,* at 615, 619, 620 (emphasis added). The Court certainly was addressing prospective circumstances, and not existing ones. There is no reason to believe that the potential for excessive entanglement of the government in church affairs is any less offensive to the first amendment than the potential for burdening the free exercise of religion. The Supreme Court in *Lemon* suggested this equal treatment of establishment and free exercise claims when it stated:

> [W]e cannot ignore here the *danger* that pervasive modern governmental power will *ultimately* intrude on religion and thus conflict with the Religion Clauses.

403 U. S. at 620 (emphasis added). The applicability of the same rationales and modes of analysis to both establishment and free exercise claims has been discussed *supra.* The first amendment establishes a zone of governmental religious neutrality; government can neither aid nor inhibit religion. It would be a *non sequitur* to say that potential aid is protected against, but not potential inhibition. I find no cases or authorities wherein the *potential* for inter-

41. In *Lemon,* the Supreme Court was reviewing the decision of a three judge district court to grant a motion to dismiss.

ference with religious activity was critical to the condemnation of certain legislation. Rather, the warnings of the Supreme Court are heeded in that the first amendment expresses broad objectives and not precisely drawn standards. Where the potential for government interference and confrontation with a Church are as inevitable as the NLRA here provides, an objective of the first amendment is threatened and thus a religious liberty interest is necessarily at stake.[42]

Inquiry does not end merely having determined that there exists a burden upon the pastors and their Church's freedom to exercise their religious belief. For even though religious activity is inhibited by reason of government regulation, where the government's interest is sufficiently compelling it may be permitted to override a conflicting first amendment right. *Wisconsin v. Yoder, supra,* at 213-14; *Sherbert v. Verner, supra* at 406.

Government regulation which effects religious activity is inevitable in this day and age; a total separation of church and state is not possible. Fortunately, because both popularly elected government and religious tenets generally share common beneficent purposes, their concerns often overlap without interfering with each other. Public health and safety regulations and criminal laws are good examples of government regulation generally tracked by religious belief. The argument that if not required to be regulated by the NLRA then Catholic schools would neces-

42. This sensitivity to potential infringement of protected religious liberty interests is somewhat analogous to the notion of "chilling effect" in the free speech area. Where legislation threatens or tends to inhibit the exercise of constitutionally protected speech, it will be condemned. The free speech guarantee, as with the religious liberty guarantee, is considered sufficiently precious and worthy of protection that a court need not wait until that right has actually been transgressed. A substantial threat which "chills" the exercise of that right is sufficient to invalidate the legislation. *See Freedman v. Maryland,* 380 U. S. 51, 61 (1965).

sarily be also exempt from fire inspections, building and zoning regulations, and public health requirements is baseless on two counts. First, as plaintiffs' counsel has stated, these forms of government regulation coalesce with general religious belief and the Church would not seek to insulate itself from these civic obligations. Second, these types of regulations reflect the paramount responsibilities of government, to provide for individual health and safety, and they represent the "compelling" end on the continuum of governmental interests. This latter point leads us to determine whether the NLRA seeks to protect basic federal interests sufficiently important to override the interference with religious liberty. The purpose and operation of the NLRA has already been discussed at some length. The importance of that Act to the flow of interstate commerce and the importance of employees' rights to self-organization and uncoerced selection of bargaining representatives is not here questioned. However, in the balancing of competing interests, plaintiffs' religious liberty interests must prevail. In *Sherbert v. Verner, supra,* the Supreme Court stated that "in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" [43] While such abuses and interests might be present with respect to the governmental regulations concerning immediate public health and safety, in the broad sense they are not the abuses and interests contemplated by the NLRA. The nonapplication of the Act to Catholic parish elementary schools simply does not conjure up an impression of grave abuses endangering paramount federal interests, or for that matter, the lesser abuses and dangers sought to be alleviated by the Act.

43. 374 U. S. at 406, *quoting Thomas v. Collins,* 323 U. S. 516, 530 (1945).

Thus, it is my conclusion that application of the National Labor Relations Act to these schools violates the free exercise of religion guarantee of the first amendment.

2. *Establishment Claims.*

Meek v. Pittenger, supra, recapitulated and summarized the analysis set forth by the Supreme Court in *Walz v. Tax Commissioner, supra,* and *Lemon v. Kurtzman, supra,* with respect to government intervention in, and confrontation with, religious affairs. The Court, in alluding to the final of three tests a statute must pass in order to avoid condemnation by the first amendment, stated that "the statute and its administration must avoid excessive government entanglement with religion." "Excessive entanglement," as a microcosm of the first amendment itself, does not reflect a four-cornered standard absolutely and mechanically applicable in all instances. Rather, it has been stated by the Supreme Court that

> [j]udicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.[44]

Beyond this statement, little may be gleaned from prior Court considerations of excessive entanglement. We do know that this doctrine contemplates statutes which "foster" an impermissible degree of entanglement and are "pregnant" with the dangers of involving the government and the Church in conflicts and confrontations, and where the government must evaluate, assess, or monitor religious affairs in some substantial fashion. Again, we pause to

44. *Lemon v. Kurtzman, supra* at 614, quoted in *Wolman v. Walter,* 45 U. S. L. W. 4861, 4862-63 (U. S. June 24, 1977).

reiterate that total separation of church and state is not possible; there are many church-state contacts which would be permissible. The test of excessive entanglement is inescapably one of degree.

The regulatory and enforcement powers of the NLRB have previously been described. Concededly, the rather broad investigatory powers of the NLRB are more discretionary than mandatory. However, they would appear to be necessary in many instances. For example, where a representation petition is filed with the NLRB, an initial determination as to jurisdiction must be made. The NLRB is obliged to ascertain the amount, if any, of interstate commerce affected by the employer's activities. Most, if not all, of this information would have to be garnered from the employer itself, and this is the customary practice. My reading of the Act as it pertains to investigations leads me to believe that the employer, if it at first resisted supplying this information, could be compelled by the NLRB to produce the documents, books, records, etc., reflecting this necessary information. This type of an entanglement or confrontation between the Church schools and the NLRB is not only inevitable but similar investigatory confrontations may arise in other circumstances covered by the NLRA. The NLRB is authorized to gather and inspect financial data of the parish schools and can compel the disclosure of such data. Though we discussed the matters of bargaining over curriculum and teacher discipline in the free exercise context, they also may be viewed as contributing to the fostering of an excessive entanglement. Where, for instance, the NLRB would be forced to determine whether certain motivations are religious in nature or not, an entangling relationship is created in the form of a confrontation.

The NLRA empowers the NLRB to investigate where it deems necessary a broad spectrum of aspects of the

parish schools' employment relationships. The NLRB may be requested and, if so, is required to determine the validity of the schools' employment practices. Those practices may be interdicted by the NLRB if deemed to constitute an unfair labor practice. Such an interdiction may include remedial orders directing the schools to engage in or refrain from certain conduct. Compliance with such orders can be monitored by the NLRB.

The entangling relationships which can arise under the NLRA appear in a wide variety of ways. Because they may result in numerous conflicts and confrontations between the NLRB and the church schools, they are, in my mind, excessive and, therefore, not permissible within the meaning of the first amendment.

3. *Conclusion.*

The Religion Clauses envisioned broad objectives rather than particularized situations. Those objectives were premised upon a general colonial fear of sovereign intrusion into religious areas. The first amendment should be interpreted in light of history. Although particularized approaches to church-state controversies have been formulated and reformulated by the federal courts, the spirit of the Religion Clauses must also be consulted for guidance.

The Supreme Court expressed this concern for the zealous protection of religious liberty, although in a concededly different context, when it suggested that the first amendment

> radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government, as well as those of faith and doctrine.

Kedroff v. Saint Nicholas Cathedral, 344 U. S. 94, 116 (1952). In my mind, this "spirit" does not encompass the regulation of pervasively religious schools by an Act whose purpose was the alleviation of industrial strife.

V. Relief.

This court has previously entered a preliminary injunction enjoining the defendant Hirsch from conducting a representation election among the lay teachers of the parish elementary schools or further asserting its jurisdiction over those schools. That injunction was modified by order of the Supreme Court so as to permit an election to be conducted and the ballots to be impounded. This matter has now come on to be heard on plaintiffs' motion for a permanent injunction.

For the reasons set forth, *supra,* the defendant Hirsch will be permanently enjoined from asserting its jurisdiction over the parish elementary schools within the Archdiocese of Philadelphia. This permanent relief will not affect the stay order of the Supreme Court filed May 19, 1977. The election already having taken place and the ballots properly impounded, the ballots will remain so impounded pending final appeal.

APPENDIX I.

Form NLRB-502 (11-64)

Form Approved
Budget Bureau No. 64-R002.14

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

PETITION

INSTRUCTIONS.—Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located. If more space is required for any one item, attach additional sheets, numbering item accordingly.

DO NOT WRITE IN THIS SPACE

CASE NO.
4-RC-11987

DATE FILED
1-16-76

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

---

1. Purpose of this Petition *(If box RC, RM, or RD is checked and a charge under section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)*

(Check one)

× RC—CERTIFICATION OF REPRESENTATIVE—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.

☐ RM—REPRESENTATION (EMPLOYER PETITION) — One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.

☐ RD—DECERTIFICATION—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.

☐ UD—WITHDRAWAL OF UNION SHOP AUTHORITY—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.

☐ UC—UNIT CLARIFICATION—A labor organization is currently recognized by employer, but petitioner seeks clarification of placement of certain employees:

(Check one)

☐ In unit not previously certified

☐ In unit previously certified in Case No. .....

☐ AC—AMENDMENT OF CERTIFICATION—Petitioner seeks amendment of certification issued in Case No. .....

Attach statement describing the specific amendment sought.

2. Name of Employer
ARCHDIOCESE OF PHILADELPHIA

Employer Representative to Contact
John Cardinal Krol

Phone No.
587-3800

3. Address(es) of Establishment(s) Involved *(Street and number, city, State, and ZIP Code)*

222 North 17th Street, Philadelphia, Pennsylvania 19103

4a. Type of Establishment *(Factory, mine, wholesaler, etc.)*

Educational institution

4b. Identify principal Product or Service

teaching

5. Unit Involved *(In UC petition, describe PRESENT bargaining unit and attach description of proposed clarification.)*

Included All lay teachers employed in the elementary schools of the Archdiocese of Philadelphia

Excluded All other employees, guards and supervisors, as defined in the National Labor Relations Act

6a. Number of Employees in unit:

Present 2,000

Proposed (by UC/AC)

.....

6b. Is This Petition Supported by 30% or More of the Employees in the Unit?
× yes ☐ No

*Not applicable in RM, UC, and AC

(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a. ☐ Request for recognition as Bargaining Representative was made on December 12, 1975 and Employer declined recognition on or about December 29, 1975 *(If no reply received, so state)*

7b. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

8. Recognized or Certified Bargaining Agent *(If there is none, so state)*

Name — Affiliation

NONE

Address — Date of Recognition or Certification

9. Date of expiration of current contract, if any *(Show month, day, and year)*

10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop *(Month, day, and year)*

11a. Is there now a strike or picketing at the employer's establishment(s) involved?

Yes ..... No ..×..

11b. If so, approximately how many employees are participating?

11c. The employer has been picketed by or on behalf of .....a labor organization, of
(Insert name)

..... since .....
(Insert address) *(Month, day, year)*

12. Organizations or individuals other than petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5 above. (if none, so state.)

Name	Affiliation	Address	Date of Claim *(Required only if Petition is filed by Employer)*
None			

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Association of Catholic Teachers Local Union No. 1776, American Federation of Teachers, AFL-CIO
(Petitioner and affiliation, if any)

By Leonard Spear LEONARD SPEAR Attorney
(Signature of representative or person filing petition) *(Title, if any)*

Address 12th Fl., Lewis Tower Bldg., Phila., Pa. 19102
(Street and number, city, State, and ZIP Code)

KI 6-4183
(Telephone number)

Willfully false statement on this petition can be punished by fine and imprisonment (U.S. Code, Title 18, Section 1001)

GPO 896-179

APPENDIX II.

NATIONAL LABOR RELATIONS BOARD
Fourth Region
Suite 4400, Wm. J. Green, Jr. Federal Building
600 Arch Street
Philadelphia, Pennsylvania 19106

January 16, 1976

Archdiocese of Philadelphia Telephone 215-597-7601
222 North 17th St.
Phila., Pa. 19103

Re: Archdiocese of Philadelphia
Case No. 4-RC-11987

Gentlemen:

A petition pursuant to the provisions of the National Labor Relations Act, has been filed with this office. A copy is attached. Also enclosed is a copy of Form NLRB 4812 which explains our investigation and voluntary adjustment procedures.

Attention is called to your right, and the right of any party, to be represented by counsel or other representative in any proceedings before the National Labor Relations Board and the Courts. You may also choose to designate a representative as agent for service of documents. Form NLRB 4701 and NLRB 4813 are enclosed for this purpose. If you choose to use these forms, please submit them promptly to this office.

In addition, please submit promptly to this office the following information:

(1) The attached questionnaire filled out in the appropriate sections. If the criteria set forth in the questionnaire do not apply to your enterprise,

please telephone the Board Agent assigned to the case.

(2) Copies of correspondence and existing or recently-expired collective bargaining contracts, if any, covering any of the employees in the unit alleged in this petition. Names and addresses of any other labor organizations claiming to represent any of the employees in the proposed unit.

(3) An alphabetized list of employees described in the petition, together with their job classifications for the payroll period immediately preceding the date of this letter.

(4) Your position as to the appropriateness of the unit.

(5) Names and addresses of eligible voters must also be furnished by the Employer in accordance with the instructions given in Form NLRB 4812, in the event an election is agreed to or directed in this case.

(6) Are you willing to consent to an election? If so, please specify the date or dates within the next five working days on which you can attend a joint conference.

(7) If no joint conference can be held within the next week or if any of the parties do not indicate a willingness to consent to an election, formal notice of hearing may issue scheduling a hearing within eighteen days from the date the petition was filed in order to resolve the issues concerning representation raised by the filing of the petition.

It has been our experience that by the time a petition such as this one has been filed, employees may have questions about what is going on and what may happen. At this point in the handling of this case, we, of course, do not know what disposition will be made of the petition, but experience tells us that an explanation of rights, responsibilities, and Board procedures can be helpful to your employees.

The Board believes that employees should have readily available information about their rights and the proper conduct of employee representation elections. At the same time, employers and unions should be apprised of their responsibilities to refrain from conduct which could impede employees' freedom of choice. Accordingly, you are requested to post the enclosed Notice to Employees in conspicuous places in areas where employees such as those described in the enclosed petition work, and to advise me whether they have been posted. Copies of this Notice are being made available to the labor organization(s) involved. In the event an election is not conducted pursuant to this petition, you are requested to remove the posted Notice.

Investigation of this matter has been assigned to the staff member named below. If you have any questions, do not hesitate to communicate with him.

Your cooperation in this matter will be appreciated.

Very truly yours,

PETER W. HIRSCH
Peter W. Hirsch
Regional Director

Enclosures

cc:
Stradley, Ronan, Stevens & Young, 1300 Two Girard Plaza, Phila., Pa. 19102 Association of Catholic Teachers Local Union No. 1776, American Federation of Teachers, AFL-CIO, By: Leonard Spear, Esquire, 12th Floor Lewis Tower Bldg., Phila., Pa. 19102

Case Assigned to: DONALD M. SPOONER
Telephone Number: 597-7654

Form NLRB-4701
(7-68) SPOONER

National Labor Relations Board
NOTICE OF APPEARANCE

Archdiocese of Philadelphia CASE No. 4-RC-11987

To: *(Check one box only)* [1]

- ☐ Regional Director
- ☐ Executive Secretary
  National Labor Relations Board
  Washington, D. C. 20570
- ☐ General Counsel
  National Labor Relations Board
  Washington, D. C. 20570

The undersigned hereby enters his appearance as representative of .....
.....
in the above-captioned matter.

.....
Signature of representative (please sign in ink)

.....
Representative's name, address, zip code (print or type)

.....
Date

.....
Area Code *Telephone Number*

1. *If case is pending in Washington and Notice of Appearance is sent to the General Counsel or the Executive Secretary, a copy should be sent to the Regional Director of the Region in which the case was filed so that his records will reflect the appearance.*

Form NLRB-4813
(7-72)

National Labor Relations Board

SPOONER

NOTICE OF DESIGNATION OF REPRESENTATIVE AS AGENT FOR SERVICE OF DOCUMENTS

Archdiocese of Philadelphia CASE No. 4-RC-11987

To: Regional Director,

I, the undersigned party, hereby designate my representative, whose name and address appears below and who has entered an appearance on my behalf in this proceeding, as my agent to receive exclusive service of all documents and written communications relating to this proceeding, including complaints and decisions and orders, but not including charges, amended charges, subpoenas, directions of election or notices of election, and authorize the National Labor Relations Board to serve all such documents only on said representative. This designation shall remain valid until a written revocation of it signed by me is filed with the Board.

.....
Signature of party (please sign in ink)

.....
Representative's name, address, zip code (print or type)

.....
Title

.....
Date

.....
Area Code *Telephone Number*

NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

CASE NO. .....

CASE NAME .....

INTERSTATE COMMERCE DATA

Please read carefully, fill in all blanks, and return promptly.

1. The undersigned firm is a (check appropriate one):

(a) Corporation .....

(b) Partnership .....

(c) Individual Enterprise .....

which was incorporated or registered in .....
(Name of State)

during year.....

2. FOR CORPORATIONS:

Named as set forth on Certification of Incorporation:

.....

Names and addresses of parent and subsidiary corporations, if any:

.....

.....

FOR PARTNERSHIPS:

State Trade Name: .....

Names and addresses of all partners: .....

.....

.....

FOR INDIVIDUAL ENTERPRISES:

State Trade Name: .....

Names and addresses of all proprietors: .....

.....

.....

3. Indicate with an "X" classification(s) which best describe(s) your business.

(a) Processing and/or manufacturing .....

(b) Wholesaling .....

(c) Retail outlet .....

(d) Trucking .....

(e) Service Organization .....

(f) Public Utility or Transit System .....

(g) Newspaper and/or Broadcasting Station .....

(h) Other ....., describe .....

.....

Describe briefly the nature of your business, also state whether it is one of a chain or one of several separate but related enterprises:

.....

4. During the past calendar or fiscal year:

(a) Did dollar volume of your sales or performance of services to customers outside the State equal or exceed $50,000? Yes( ) No ( )

(b) Did dollar volume on your sales or performance of services equal or exceed $50,000 to firms which, in turn, made sales to customers outside the State? Yes ( ) No ( )

(c) Did dollar volume of your purchases of goods or services from outside the State equal or exceed $50,000? Yes ( ) No ( )

(d) Did dollar volume of your purchases equal or exceed $50,000 from firms which, in turn, purchase these goods from outside the State? Yes ( ) No ( )

(e) Did dollar volume of all your sales or performances of services equal or exceed $500,000? Yes ( ) No ( )

(f) If answers to (a) through (e) are "No" please specify amounts in each category. (If additional space is needed, please use reverse side of this sheet or separate sheet.)

5. Are you a member of, or participant in, an association or group which engages in collective bargaining? Yes ( ) No ( ) (if answer is "Yes", please give title and address.)

.....

.....

6. If you performed national defense work, give dollar volume of such work and names of Government agencies or private firms for which such work was performed.

.....

.....

.....

7. Name and title of your representative best qualified to give further information:

.....

8. The firm concedes that it is engaged in interstate commerce and subject to the jurisdiction of the National Labor Relations Board. Yes ( ) No ( )

.....
(Firm Name)

By: .....
(Name)

.....
(Title)

.....
(Telephone Number)

NOTICE TO EMPLOYEES
FROM THE

National Labor Relations Board

A PETITION has been filed with this Federal agency seeking an election to determine whether certain employees want to be represented by a union.

The case is being investigated and NO DETERMINATION HAS BEEN MADE AT THIS TIME by the National Labor Relations Board. If an election is held Notices of Election will be posted giving complete details for voting.

It was suggested that your employer post this notice so the National Labor Relations Board could inform you of your basic rights under the National Labor Relations Act.

YOU HAVE THE RIGHT under Federal Law	• To self-organization • To form, join, or assist labor organizations • To bargain collectively through representatives of your own choosing • To act together for the purposes of collective bargaining or other mutual aid or protection • To refuse to do any or all of these things unless the union and employer, in a state where such agreements are permitted, enter into a lawful union security clause requiring employees to join the union.

It is possible that some of you will be voting in an employee representation election as a result of the request for an election having been filed. While NO DETERMINATION HAS BEEN MADE AT THIS TIME, in the event an election is held, the NATIONAL LABOR RELATIONS BOARD wants all eligible voters to be familiar with their rights under the law if it holds an election.

The Board applies rules which are intended to keep its elections fair and honest and which result in a free choice. If agents of either Unions or Employers act in such a way as to interfere with your right to a free election, the election can be set aside by the Board. Where appropriate the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including back-pay from the party responsible for their discharge.

NOTE:

The following are examples of conduct which interfere with the rights of employees and may result in the setting aside of the election.

- Threatening loss of jobs or benefits by an Employer or a Union
- Misstating important facts by a Union or an Employer where the other party does not have a fair chance to reply
- Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises
- An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time within the 24-hour period before the election
- Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a Union or an Employer to influence their votes

Please be assured that IF AN ELECTION IS HELD every effort will be made to protect your right to a free choice under the law. Improper conduct will not be permitted. All parties are expected to cooperate fully with this agency in maintaining basic principles of a fair election as required by law. The National Labor Relations Board as an agency of the United States Government does not endorse any choice in the election.

NATIONAL LABOR RELATIONS BOARD
[SEAL] *an agency of the*
UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

NOTICE: PARTIES INVOLVED IN A REPRESENTATION PETITION SHOULD BE AWARE OF THE FOLLOWING PROCEDURES:

Right to be represented by counsel

Any party has the right to be represented by counsel or other representative in any proceeding before the National Labor Relations Board and the courts. In the event you wish to have a representative appear on your behalf, please have your representative complete Form NLRB-4701, Notice of Appearance, and forward it to the respective regional office as soon as counsel is chosen.

Designation of representative as agent for service of documents

In the event you choose to have a representative appear on your behalf, you may also, if you so desire, use Form NLRB-4813 to designate that representative as your agent to receive exclusive service on your behalf of all formal documents and written communications in the proceeding, excepting decisions directing an election and notices of an election, and further excepting subpoenas, which are served on the person to whom they are addressed. If this form is not filed, both you and your representative will receive copies of all formal documents. If it is filed copies will be served only upon your representative, and that service will be service upon you under the statute. The designation once filed shall remain valid unless a written revocation is filed with the Regional Director.

Investigation of petition

Immediately upon receipt of the petition, the regional office conducts an impartial investigation to determine if

the Board has jurisdiction, whether the petition is timely and properly filed, whether the showing of interest is adequate, and if there are any other interested parties to the proceeding or other circumstances bearing on the question concerning representation.

Withdrawal or dismissal

If it is determined that the Board does not have jurisdiction or that other criteria for proceeding to an election are not met, the petitioner is offered an opportunity to withdraw the petition. Should the petitioner refuse to withdraw, the Regional Director dismisses the petition and advises the petitioner of the reason for the dismissal and of the right to appeal to the Board.

Agreement and conduct of election

Upon the determination that the criteria are met for the Board to conduct a secret ballot election to resolve the question concerning representation, the parties are afforded the opportunity to enter into a consent election agreement. There are two forms: An Agreement for Consent Election provides that the parties accept the final determination of the Regional Director, a Stipulation for Certification Upon Agreement for Consent Election provides for the right of appeal to the Board on postelection matters. The secret ballot election will be conducted by an agent of the NLRB under the terms of the agreement and the parties shall have the right to observe and certify to the conduct of the election.

Hearing

If there are material issues which the parties cannot resolve by agreement, the Regional Director may issue a notice of hearing on the petition. At the hearing, all parties will be

afforded the opportunity to state their positions and present evidence on the issues.

Scheduling of a hearing does not preclude the possibility of a consent election agreement. Approval of an agreement will serve as withdrawal of the notice of hearing.

Names and addresses of eligible voters

Upon approval of an election agreement, or upon issuance of a direction of election, the employer will be required to prepare a list of the names and addresses of eligible voters. The employer must file the eligibility list with the Regional Director within 7 days after approval of the election agreement, or after the Regional Director or the Board has directed an election. The Regional Director then makes the list available to all other parties. The employer is advised early of this requirement so that he will have ample time to prepare for the eventuality that such a list becomes necessary. (This list is in addition to list of employees in the proposed unit and their job classifications to be used to verify the showing of interest by a union.)

APPENDIX III.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 4-RC-11987

ARCHDIOCESE OF PHILADELPHIA

Employer

and

ASSOCIATION OF CATHOLIC TEACHERS LOCAL UNION NO. 1776, AMERICAN FEDERATION OF TEACHERS, AFL-CIO

Petitioner

NOTICE OF REPRESENTATION HEARING

The Petitioner, above named, having heretofore filed a Petition pursuant to Section 9(c) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151 *et seq.*, copy of which Petition is hereto attached, and it appearing that a question affecting commerce has arisen concerning the representation of employees described by such Petition,

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, on the 23, 24, 25, 26 & 27 days of February , 1976, at 10:00 o'clock in the forenoon, Eastern Standard Time, in a hearing room of the National Labor Relations Board, Suite 4400, William J. Green, Jr. Federal Building, 600 Arch Street, Philadelphia, Pennsylvania 19106 a hearing will be conducted before a hearing officer of the National Labor Relations Board upon the question of representation affecting commerce which has

arisen, at which time and place the parties will have the right to appear in person or otherwise, and give testimony.

Signed at Philadelphia, Pa. on the 27th day of January, 1976

Form NLRB 4669 attached

/s/ Alan Zurlnick
[SEAL] Acting Regional Director, Region Four
National Labor Relations Board

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-279

REV. JOHN J. CAULFIELD, et al.

v.

PETER W. HIRSCH, Regional Director for the Fourth Region, National Labor Relations Board

and

ASSOCIATION OF CATHOLIC TEACHERS, Local 1776, AFT, AFL-CIO

ORDER.

AND Now, this 7th day of July, 1977, it is hereby ORDERED that:

1. The National Labor Relations Act, 29 U. S. C. § 151 *et seq.* is declared unconstitutional as applied to the employment relationships between the lay teachers and the parish elementary schools within the Archdiocese of Philadelphia.

2. The defendant, Peter W. Hirsch, Regional Director of the Fourth Region of the National Labor Relations Board and all persons acting on his official behalf or on behalf of the National Labor Relations Board, are permanently enjoined from asserting jurisdiction or taking any administrative action by reason of the National Labor Relations Act or rules and regulations promulgated pursuant thereto with respect to or in connection with the parish elementary schools of the Archdiocese of Philadelphia and the lay teachers employed therein.

3. The ballots in the representation election conducted under the auspices of the National Labor Relations Board on June 14, 1977 and permitted pursuant to the partial stay order of May 19, 1977 of Mr. Justice Brennan of the United States Supreme Court shall remain impounded and untallied pending final disposition of any and all appeals or until further order of court. In the event no appeal is taken within the time allowed by law or rule of court, plaintiffs may make application to this court for destruction or other appropriate disposition of the impounded ballots.

BY THE COURT:

VAN ARTSDALEN, J.

APPENDIX B.

The National Labor Relations Act, as amended, 29 U. S. C. § 151 *et seq.*, provides, in pertinent part, as follows:

> Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.
>
> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.
>
> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impair-

ment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 2. . . .

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof. . . .

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, . . . but shall not include . . . any individual employed . . . by any other person who is not an employer as herein defined.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States. . . .

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce. . . .

* * *

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.

. . .

Section 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employ-

ment to encourage or discourage membership in any labor organization . . .;

* * *

(5) to refuse to bargain collectively with the representatives of his employees. . . .

* * *

Section 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . .

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in Section 9(a) . . .

* * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * *

Section 10. (a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. . . .

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency. . . .

(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . . Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. . . . No order of the Board shall require the reinstatement of any individual as an employee who has been sus-

pended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . .

* * *

Section 11. For the purpose of all hearings and investigations which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. . . .

(2) In case of contumacy or refusal to obey a subena issued to any person, any district court of the United States . . . within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof. . . .

APPENDIX C.

SUPREME COURT OF THE UNITED STATES

No. A-936

PETER W. HIRSCH, REGIONAL DIRECTOR FOR THE FOURTH REGION, NATIONAL LABOR RELATIONS BOARD,

Applicant,

v.

REV. JOHN J. CAULFIELD, ET AL.

ORDER.

UPON CONSIDERATION of the application of the Solicitor General of the United States and the response filed thereto,

IT IS ORDERED that the injunction entered February 17, 1977 by the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 76-279, be and the same is hereby, stayed to the extent that the National Labor Relations Board is permitted to hold a representation election and to impound the ballots pending

final disposition of the appeal by the United States Court of Appeals for the Third Circuit.

/s/ WM. J. BRENNAN, JR.
Associate Justice of the Supreme
Court of the United States

Dated this 19 day of May, 1977

A true copy MICHAEL RODAK, JR.
Test:
Clerk of the Supreme Court of the United States
By FRANCIS J. LORSON
Deputy

APPENDIX D.

Office of the Clerk
UNITED STATES COURT OF APPEALS

THOMAS F. QUINN
Clerk

For the Third Circuit

TELEPHONE
215-597-2995

21400 United States Courthouse
Independence Mall West
601 Market Street
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February 22, 1978

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Philadelphia, Pa. 19102

Earl W. Trent, Esquire
National Ministries
American Baptist Church of the USA
Valley Forge, Pa. 19481
(for your information only)

Re: Rev. John J. Caulfield, etc., et al. vs. Peter W. Hirsch, etc., et al.; Association of Catholic Teachers, etc., Appellant in 77-1318 & 77-2021 & Peter W. Hirsch, etc., Appellant in 77-1328 & 77-1972
Nos. 77-1318, 77-1328, 77-1972 & 77-2021

Dear Counsel:

This will confirm our telephone conversation with each of your respective offices today concerning the above-entitled cases.

The Court has directed me to advise you that it has decided to continue the argument fixed for Thursday, February 23, 1978, before the Court en banc, because the United States Supreme Court has granted certiorari in NLRB v. Catholic Bishop of Chicago (No. 77-752).

Very truly yours,

T. F. QUINN/jr
T. F. Quinn, Clerk

jr

Supreme Court, U. S.
FILED
MAY 31 1978
MICHAEL RODAK, JR., CLERK

No. 77-1411

In the Supreme Court of the United States

OCTOBER TERM, 1977

REV. JOHN J. CAULFIELD, PASTOR, ST. ATHANASIUS CHURCH, ET AL., PETITIONERS

v.

PETER W. HIRSCH, REGIONAL DIRECTOR FOR THE FOURTH REGION, NATIONAL LABOR RELATIONS BOARD

AND

ASSOCIATION OF CATHOLIC TEACHERS, LOCAL 1776, AFT, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
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JOHN E. HIGGINS, JR.,
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NORTON J. COME,
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Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1411

REV. JOHN J. CAULFIELD, PASTOR, ST. ATHANASIUS CHURCH, ET AL., PETITIONERS

v.

PETER W. HIRSCH, REGIONAL DIRECTOR FOR THE FOURTH REGION, NATIONAL LABOR RELATIONS BOARD

AND

ASSOCIATION OF CATHOLIC TEACHERS, LOCAL 1776, AFT, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The opinion of the district court (Pet. App. A1-A41) is not yet officially reported.

JURISDICTION

The judgment of the district court was entered on July 7, 1977. Appeals by respondents Hirsch and Association of Catholic Teachers, Local 1776, were docketed in the court of appeals on July 27, 1977 (No. 77-1972), and

August 5, 1977 (No. 77-2021). The petition for a writ of certiorari before judgment was filed on April 4, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a district court may enjoin National Labor Relations Board representation proceedings, where the procedures established by the National Labor Relations Act provide an adequate method for review of petitioners' contentions and those procedures have not been exhausted.

STATEMENT

On January 16, 1976, Local Union No. 1776, Association of Catholic Teachers, American Federation of Teachers, AFL-CIO (the Union), filed a petition with the National Labor Relations Board seeking a representation election in a unit of lay teachers employed at the parish elementary schools within the Archdiocese of Philadelphia.[1] Petitioners, pastors of five of the parishes that operate elementary schools, responded by filing this action in the United States District Court for the Eastern District of Pennsylvania, seeking to enjoin the Board's Regional Director from proceeding with the Union's representation petition on the ground that the application of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), to the parish schools violated the Free Exercise and Establishment Clauses of the First Amendment. The district court stayed the proceedings pending a decision by the Board on whether it would direct an election on the Union's

[1]The Archidiocese has voluntarily bargained with the union for the lay teachers employed in its secondary schools for some ten years. *Archdiocese of Philadelphia*, 227 NLRB 1178, 1180.

petition. (Pet. App. A2-A4). On January 17, 1977, the Board issued its decision, ordering that a representation election be held among all full-time lay teachers employed by the approximately 275 parish elementary schools within the Archdiocese. *Archdiocese of Philadelphia*, 227 NLRB 1178.

On January 25, 1977, petitioners moved to reactivate their request for injunctive relief. On February 17, 1977, the district court denied the Regional Director's motion to dismiss for lack of jurisdiction and granted a preliminary injunction preventing the Regional Director from conducting the scheduled election or taking any other action relating to petitioners' schools (Pet. App. A5). The Regional Director and the Union appealed from the preliminary injunction (C.A. 3, Nos. 77-1318 and 77-1328). On May 19, 1977, Mr. Justice Brennan granted a stay of the preliminary injunction to permit the Board to conduct the election and to impound the ballots pending final disposition of the appeals (Pet. App. A73-A74).[2] The representation election was conducted on June 14, 1977, and the ballots were, and remain, impounded (*id.* at A6).

On July 7, 1977, the district court permanently enjoined the Regional Director from asserting jurisdiction over the parish elementary schools in the Archdiocese of Philadelphia. At the outset, the court determined that it had jurisdiction to enjoin the Board's administrative proceedings, reasoning that the review provisions of Section 10(e) and (f) of the Act, 29 U.S.C. 160(e) and (f), which provide for court of appeals review of final orders of the Board, precluded district court review only of labor

[2]On May 31, 1977, the Court denied petitioners' motion to vacate the stay. 431 U.S. 935.

law issues, not of constitutional ones (Pet. App. A6-A12).[3] The district court then held that the Act was unconstitutional as applied to the parish schools, concluding that it would burden the free exercise of petitioners' religious beliefs and would lead to an impermissible government entanglement in religious affairs (*id.* at A29-A41).

The Regional Director and the Union appealed from the order granting a permanent injunction to the United States Court of Appeals for the Third Circuit. Petitioners seek review by this Court in advance of judgment by the court of appeals.[4]

ARGUMENT

Petitioners request this Court to take the extraordinary step of granting certiorari to review a district court decision in their favor in advance of judgment by the court of appeals. The premise for petitioners' request is that this case presents the same question that is pending before the Court in *National Labor Relations Board* v. *Catholic Bishop of Chicago*, No. 77-752, certiorari granted, February 21, 1978, *i.e.*, whether the National

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[3]The court acknowledged that *Grutka* v. *Barbour*, 549 F. 2d 5 (C.A. 7), certiorari denied, 431 U.S. 908, which held that the district court lacks jurisdiction to enjoin the Board's application of the Act to parochial elementary and secondary schools on First Amendment grounds, was "directly on point," but it concluded that that case "was incorrectly decided" (Pet. App. A8).

[4]On September 8, 1977, the court of appeals heard oral argument on the appeals from the district court's preliminary injunction. On November 25, 1977, the court ordered the appeals to be reheard *en banc* along with the appeals from the district court's final order. On February 22, 1978, the Third Circuit decided to postpone oral argument in both cases because of this Court's grant of certiorari in *National Labor Relations Board* v. *Catholic Bishop of Chicago*, No. 77-752 (Pet. App. A75-A76).

Labor Relations Act may constitutionally be applied to parochial schools. However, while the district court did determine that the application of the Act to petitioners' schools would violate the First Amendment, there is a substantial threshold question whether it had jurisdiction to make that determination. As we show below, it is likely that the court of appeals will conclude that the district court lacked jurisdiction and that this Court would decline to grant review of that decision. See *Grutka* v. *Barbour*, 549 F. 2d 5 (C.A. 7), certiorari denied, 431 U.S. 908. In these circumstances, petitioners cannot show that "the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." Sup. Ct. R. 20.

1. Ordinarily district courts do not have jurisdiction to enjoin the Board from conducting representation or unfair labor practice proceedings, because judicial review of Board action may be had only in the court of appeals following issuance of a final order in an unfair labor practice proceeding. *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-479; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48-49. Such review affords "an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board." *Myers* v. *Bethlehem Shipbuilding Corp.*, *supra*, 303 U.S. at 48. "[U]ntil the Board's order has been affirmed by the appropriate * * * Court of Appeals, no penalty accrues for disobeying it," and "all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of *constitutional right or staturoty authority*, are open to examination by the court." *Id.* at 48-49; emphasis added.

The procedures leading to judicial review in the ordinary course do not themselves violate petitioners' rights, and thus there is no reason to permit injunctive

action in the district court. *Grutka* v. *Barbour, supra,* 549 F. 2d at 9-10. At most, petitioners might be subject in the interim to a Board order to bargain with the Union as the representative of the lay teachers in the Archdiocese's elementary schools. Such an order may never issue, however, and if it does not issue there will be no need to resolve the First Amendment question petitioners seek to present as to their schools.[5]

Even if the Board should issue a bargaining order, petitioners would not be obliged to comply until the order had been enforced by a court of appeals. Petitioners would have a full opportunity to present to that court their constitutional arguments why the order should not be enforced. The statutory procedure thus affords petitioners an adequate means to obtain judicial review of their contentions, in the context of a particular administrative order.[6]

2. *Leedom* v. *Kyne,* 358 U.S. 184, does not assist petitioners. *Kyne* held that district courts may entertain a challenge to Board action that is admittedly contrary to a specific mandatory prohibition in the Act where the absence of district court jurisdiction would result in " 'a

---

[5]Since the representation election has already been conducted pursuant to the partial stay granted by Mr. Justice Brennan, the further administrative proceedings to which petitioners would be subject in the absence of an injunction would merely involve the counting of the ballots cast and the certification of results of the election. If the Union loses the election, it will have the option of filing objections that, if sustained, could necessitate the holding of a second election. However, no bargaining order can issue unless the Union is ultimately able to establish that it has the support of a majority of the unit employees.

[6]The statutory procedure was followed by the employers in *National Labor Relations Board* v. *Catholic Bishop of Chicago, supra,* and in *Cardinal Timothy Manning* v. *National Labor Relations Board,* pending on petition for review, C.A. 9, No. 77-1286.

sacrifice or obliteration of a right' " because "there is no other means * * * to protect and enforce that right." *Id.* at 190. See *Boire* v. *Greyhound Corp., supra,* 376 U.S. at 480. "Unlike *Kyne,* this case presents no patent disregard by the Board of the bounds of its statutory jurisdiction." *Grutka* v. *Barbour, supra,* 549 F. 2d at 8. Moreover, the absence of power in the district court does not preclude petitioners from litigating their constitutional claims; it means only that they must do so in the statutorily prescribed manner.[7]

3. The constitutional basis for petitioners' attack on the Board's authority does not justify bypassing the ordinary course of exhaustion of administrative remedies and review (if that should be necessary) in the court of appeals. As the Court stated in *Myers* v. *Bethlehem Shipbuilding Corp., supra,* 303 U.S. at 50-51, the exhaustion requirement applies to constitutional questions no less than to other types of questions.

It is particularly appropriate that the constitutional questions sought to be raised by petitioners be resolved after, rather than before, the Board proceedings have been completed. Only at the conclusion of those proceedings can "the nature and scope of the state entanglement attacked * * * be measured against a factual record delineating the character of entanglement which assertedly arises from the state intrusion." *Grutka* v. *Barbour, supra,*

---

[7]In *McCulloch* v. *Sociedad Nacional,* 372 U.S. 10, district court intervention in the Board proceeding was justified only because actions taken by the Board "created international problems for our Government." *Id.* at 16-17. No such extraordinary circumstances are presented here. This Court stressed in *Sociedad Nacional* that the jurisdictional holding in that case was "not to be taken as an enlargement of the exception in *Kyne.*" 372 U.S. at 17. See *Boire* v. *Greyhound Corp., supra,* 376 U.S. at 480.

549 F. 2d at 8.[8] Furthermore, the fact that the Board's determinations of the statutory issues raised by petitioners, or the court of appeals' review of those determinations, may obviate the necessity of ever deciding the constitutional questions presented in this case "constitutes a strong reason for not allowing" anticipatory judicial intervention. *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 772. See also *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U.S. 549, 568.[9]

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[8]The district court record in this case is not an adequate substitute for a full administrative hearing. It reveals nothing about the impact of the Act upon petitioners' schools other than the subjective fears and speculations of several clergymen, none of whom are shown to have any familiarity with the functioning of the Board or the Act. Moreover, it provides no basis for resolving the statutory issues raised by petitioners, which (as noted above) may obviate the necessity for reaching the constitutional issues.

[9]Although petitioners did not raise their constitutional claims before the Board, they did argue, on statutory grounds, that the individual parish elementary schools should be deemed to be the sole employers of the lay teachers, that they therefore did not meet the Board's monetary jurisdictional standard, and that an employer-wide unit was inappropriate for bargaining. After consideration of extensive evidence, the Board concluded that the schools and the Archdiocese were joint employers whose combined revenues satisfied the discretionary standard and that an employer-wide unit was appropriate. *Archdiocese of Philadelphia, supra*, 227 NLRB at 1178-1181.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

RICHARD B. BADER,
CAROL A. DE DEO,
Attorneys,
National Labor Relations Board.

MAY 1978.

DOJ-1978-05

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-1411.

REV. JOHN J. CAULFIELD, Pastor, St. Athanasius Church, REV. THOMAS A. KANE, J.C.D., Pastor, Nativity of Our Lord Church, VERY REV. JAMES G. SHERMAN, O.S.A., Pastor, St. Denis Church, REV. MSGR. FREDERICK J. STEVENSON, Pastor, St. John Chrysostom Church, and REV. GEORGE R. VERMEIREN, Pastor, St. Charles Borromeo Church,

Petitioners,

v.

PETER W. HIRSCH, Regional Director for the Fourth Region, National Labor Relations Board,

and

ASSOCIATION OF CATHOLIC TEACHERS, LOCAL 1776, AFT, AFL-CIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

1. The Government concedes that this case presents the same question that is pending before the Court in

National Labor Relations Board v. Catholic Bishop of Chicago, No. 77-752, i.e., whether the National Labor Relations Act may constitutionally be applied to parochial schools, but opposes the instant Petition on the ground that this case also involves a question of district court jurisdiction. The Government would make it appear as though a question of jurisdiction separate and apart from the constitutional issue is presented by this case. Quite the contrary, Petitioners' resort to the district court for judicial relief against the Board's application of the Act and its procedures to their schools is but part and parcel of their constitutional position that the Board may not regulate employment relations in parochial schools. Properly perceived, the question of district court jurisdiction is but the natural corollary, another facet, of the same basic issue of the constitutionality of the Board's involvement in the affairs of Petitioners' schools. If, as Petitioners contend, the Constitution prohibits Board jurisdiction over parochial schools, the federal courts are doubtless obliged to enforce that prohibition; conversely, if, as the Board contends, it may constitutionally regulate the employment of teachers by parochial schools, the federal courts are without authority to disturb that scheme. In short, the question of district court jurisdiction is inextricably intertwined with the fundamental constitutional issue; it is not a reason to deny certiorari in this case, but rather an additional reason why certiorari should be granted in this case.

2. Petitioners brought this suit not to review Board action, but to enjoin Board action at the very moment of its inception. Institution of this action constituted the only effective means to Petitioners to prevent their enbroilment in Board administrative processes and all their

entangling ramifications which they sought to challenge on constitutional grounds.[1] When the question is ". . . whether it is constitutional to fasten the administrative procedure on to the litigant, the administrative agency may be defied and judicial relief sought as the only way of protecting the asserted constitutional right". *Public Utilities Commission of California v. United States,* 355 U. S. 534, 540 (1958).

Neither *Myers v. Bethlehem Shipbuilding Corp.,* 303 U. S. 41 (1938), nor *Leedom v. Kyne,* 358 U. S. 184 (1958), relied upon by the Government, teach otherwise. In *Myers,* an early Commerce Clause challenge to the constitutionality of the entire Act, the Court confirmed its observation, made the prior term in *NLRB v. Jones & Laughlin Steel Corp.,* 301 U. S. 1 (1937), that the Act ". . . does not purport to extend to the relationship between *all* . . . employees and employers . . . [but] must be construed as contemplating the exercise of control within *constitutional bounds* . . .", 301 U. S. at 31 (emphasis added). In *Leedom,* as here, suit was properly brought not to "review" Board action "made within its jurisdiction" but rather to enjoin and strike down Board action taken "in excess of its delegated powers".

The applicable principle was summarized by the Court some years ago in *Aircraft & Diesel Equipment Corp. v. Hirsch,* 331 U. S. 752 (1947): ". . . [T]he presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flow-

1. The Board's statement (Brief in Opposition, pp. 5-6) that "The procedures leading to judicial review in the ordinary course do not themselves violate petitioners' rights and thus there is no reason to permit injunctive action in the district court" epitomizes the Board's misunderstanding of Petitioners' position. It is just such procedures that Petitioners have contended from the first violate their constitutional rights and justify judicial intervention.

ing from delay incident to following the prescribed procedure, . . . [is] sufficient to dispense with exhausting the administrative process before instituting judicial intervention." 331 U. S. at 773.[2]

3. Decision of the First Amendment claims raised by *Catholic Bishop of Chicago, supra,* and this case, will be aided, not hampered, by the grant of this Petition. The issues are starkly posed here, viz.—273 parochial elementary schools employing some 2,000 lay teachers; there is an extensive trial record compiled under the supervision of a federal judge rather than a non-lawyer Board agent as is often the case in Board proceedings; [3] there is a carefully reasoned and comprehensive court opinion which addresses and determines the constitutional issues; and the conflict between the Court's view that Petitioners' schools constitute ". . . an integral part of the religious mission of the Catholic Church . . ." [4] and the Board's view that the very same schools are merely ". . . religiously associated . . ." [5] cannot be as sharply focused in any other case.

2. Exhaustion of administrative procedures is also regularly dispensed with when the constitutionality of a congressional enactment is placed in issue, where pursuit of the agency process cannot result in disposition of the constitutional claim or when a requirement to proceed with the administrative remedy would be wholly futile. See *Oestereich v. Selective Service Board,* 393 U. S. 233, 242 (1968); *Glover v. St. Louis-San Francisco Railway Co.,* 393 U. S. 324, 330 (1969); *Weinberger v. Salfi,* 422 U. S. 749, 765-66 (1975).

3. Government carping over the court record (Brief in Opposition, p. 8) comes with ill grace. The Government fully participated in the creation of the record; the testimony of Petitioners, the Archdiocesan Superintendent of Schools, and the intervenor union president, was devoted to an examination of the impact which application of the Act would have upon Petitioners' schools and, to be sure, formed the basis of the district court's opinion and decision that the Act may not be constitutionally applied to these religious schools.

4. *Lemon v. Kurtzman,* 403 U. S. 602, 616 (1971).

5. *Archdiocese of Philadelphia,* 227 NLRB No. 177 (1977).

4. Board suggestions that perhaps the issues posed by this case can be resolved on a statutory basis obviating "the necessity of ever deciding the constitutional questions" (Brief in Opposition, pp. 7-8) overlook the plain fact that the Court has already accepted the constitutional issues for review and decision in *Catholic Bishop of Chicago.* It is submitted that fullest consideration of these issues can only be had by the grant of certiorari in this case. Requiring Petitioners to complete the administrative route (including appellate review of the Board's decision [6]) will not avoid determination of the constitutional issues: should the impounded ballots be counted and the intervenor union prevail, the Board will certainly order Petitioners to bargain and they, with equal assurance, will refuse, asserting their constitutional rights; should the union not prevail, Petitioners' demand for declaratory relief from the continuing and, perhaps, recurring Board incursions into the affairs of these parochial schools will nevertheless require decision. See, *Super Tire Engineering Co. v. McCorkle,* 416 U. S. 115 (1974); *cf., Abbott Laboratories v. Gardner,* 387 U. S. 136 (1967). No further proceedings can or will eliminate the necessity for constitutional adjudication.

5. The Government does not deny the national importance of the constitutional issues presented by this case. The Government, of course, sought and obtained a writ of certiorari in *Catholic Bishop of Chicago* for review of these same issues. However, because Petitioners defied the administrative agency and sought immediate judicial

6. The Board has already rejected all of Petitioners' non-constitutional arguments. *Archdiocese of Philadelphia,* 227 NLRB No. 177 (1977). Petitioners did not present their constitutional contentions to the Board but only to the court whose decision is here sought to be reviewed in the interests of prompt and final resolution of the issues.

relief against the gradual erosion and ultimate destruction of their constitutional rights at the hands of the Board, the Government contends that review of the core issues in this case should be denied on the ground that district court intervention has placed them beyond the Court's reach. Petitioners submit that district court intervention in these circumstances is but another aspect—the logical extension—of the basic constitutional position which they and the Catholic Bishop of Chicago advance; that the Court's decision of the constitutional claims will necessarily, if indirectly, determine the matter of the propriety of district court involvement; and that the district court's presence in this case is not a reason for denying review but rather a substantial, additional reason to grant certiorari and resolve the church-state conflict. Petitioners urgently request that certiorari be granted in this case and that the issues it presents be consolidated for review with those presented by *Catholic Bishop of Chicago*.

Respectfully submitted,

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